Supreme Court, U.S.
FILED

(1)

No. 95-563 OCT 5 - 1995

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CONSTRUCTION AND LABORER'S UNION LOCAL NO. 324,
JESSE THOMAS, JESSE DURRAN, JR.,
JESSE DURRAN, SR., and CHARLES EVANS,
Petitioners,

v.

DOUGLAS MURRAY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

94 pp

QUESTIONS PRESENTED

1. Did the district court's removal of a known solitary hold-out juror late in the deliberations of an apparently hung jury in order to avoid a half-day delay in deliberations deprive petitioners of their right to a unanimous verdict under the Seventh Amendment and Fed. Rule Civ. Pro 48?

2. Did the award and cursory affirmance of punitive damages nearly 800 times greater than the actual damages deprive petitioners of their right to substantive due process and contravene national labor policy enunciated by this court disfavoring the imposition of punitive damages against unions?

3. Did the courts below create an irreconcilable conflict between a union's duties under the National Labor Relations Act and the Labor Management Reporting and Disclosure Act (LMRDA) by basing an LMRDA violation on conduct required by the collective bargaining agreement and the NLRA?

LIST OF PARTIES

The parties to the proceedings below, and before this court are:

1. Construction and Laborers Union Local 324
2. Jesse Thomas
3. Jesse Durran, Jr.
4. Charles Evans
5. Bob Davis
6. Douglas Murray

The following was a party to the proceedings below but is now deceased:

7. Jesse Durran, Sr.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	11
I. THE NINTH CIRCUIT'S DETERMINATION THAT THE REMOVAL OF A KNOWN HOLD-OUT JUROR DURING DELIBERATIONS AT A TIME WHEN THE JURY WAS HUNG WAS NOT AN ABUSE OF DISCRETION CONFLICTS WITH DECISIONS OF THE OTHER FEDERAL CIRCUITS AND VIOLATED DEFENDANTS' CONSTITUTIONAL AND FEDERAL STATUTORY RIGHT TO A UNANIMOUS VERDICT	11
II. THE JURY'S IMPOSITION OF PUNITIVE DAMAGES AMOUNTING TO NEARY 800 TIMES THE COMPENSATORY DAMAGE AWARD AND THE CURSORY REVIEW OF THAT AWARD BY THE TRIAL COURT AND COURT OF APPEALS VIOLATED PETITIONERS' RIGHT TO SUBSTANTIVE DUE PROCESS UNDER THE FIFTH AMENDMENT AND CONTRAVENED THIS COURT'S ENUNCIATION OF THE NATIONAL LABOR POLICY AGAINST WEAKENING UNIONS AND PENALIZING DUES-CONTRIBUTING MEMBERS FOR ALLEGED UNION MISCONDUCT	17

TABLE OF CONTENTS—Continued

Page

III. THE NINTH CIRCUIT HAS CREATED AN IRRECONCILABLE CONFLICT OF STATUTORY DUTIES FOR PETITIONER AND OTHER UNIONS BY AFFIRMING THE SUBMISSION TO THE JURY FOR CONSIDERATION AS AN LMRDA VIOLATION CONDUCT THAT WAS REQUIRED OF THE UNION BY THE NATIONAL LABOR RELATIONS ACT IN ORDER TO AVOID VIOLATING THE DUTY OF FAIR REPRESENTATION OWED TO OTHER UNION MEMBERS 25

CONCLUSION 30

TABLE OF AUTHORITIES

CASES — Page

Achilli v. United States, 353 U.S. 373 (1957) 30
American Publishing Co. v. Fisher, 166 U.S. 464 (1897) 11
Andres v. United States, 333 U.S. 740 (1947) 11
Breininger v. Sheet Metal Workers Int'l Assn., Local Union No. 6, 493 U.S. 67 (1989) 26
Dole v. United Steelworkers of America, 494 U.S. 26 (1990) 30
Dunn v. Hovic, 1 F.3d 1371 (3d Cir. 1993) 19
Eichenseer v. Reserve Life Ins. Co., 934 F.2d 1377 (5th Cir. 1991) 20
Green v. Zant, 715 F.2d 551 (11th Cir. 1983) 12
Honda Motor Co. v. Oberg, 512 U.S. ——, 129 L. Ed. 2d 336 (1994) 18, 19, 20
International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42 (1979) ..... *passim*
Johnson v. Hugo's Skateway, 949 F.2d 1338 (4th Cir. 1991) 20
Johnson v. Louisiana, 406 U.S. 356 (1972) 11
Klein v. Grynberg, 44 F.3d 1497 (10th Cir. 1995) .. 20
Kokoszka v. Belford, 417 U.S. 642 (1974) 29
Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986) 30
Morgan v. Woessner, 997 F.2d 1244 (9th Cir. 1993), *cert. dismissed, sub nom., Searle v. Morgan*, —— U.S. ——, 126 L.Ed.2d 640 (1994) 9
Murray v. Laborers Union Local No. 324, et al., Nos. 93-15641, 93-16176, 93-16540, slip op. 8401 (9th Cir. July 14, 1995) 9, 10, 28
NLRB v. Iron Workers Local 75, 583 F.2d 1094 (9th Cir. 1978) 26, 29
Paramount Mutual Life Insurance Co. v. Haslip, 499 U.S. 1 (1991) 9, 18, 20, 21
Robertson Oil Co., Inc. v. Phillips Petroleum Co., 14 F.3d 373 (8th Cir. 1993), *cert. denied*, 128 L.Ed.2d 677 (1994) 20
Searle v. Morgan, —— U.S. ——, 126 L.Ed.2d 640 (1994) 9

TABLE OF AUTHORITIES—Continued

	Page
Southwestern Telegraph and Telephone Co. v. Danaher, 238 U.S. 483 (1914)	23
TXO Production v. Alliance Resources, —— U.S. ——, 125 L.Ed.2d 366 (1993)	*passim*
United Paperworkers v. Misco, 484 U.S. 29 (1987)	27, 28
United States v. Essex, 734 F.2d 832 (1984)	12
United States v. Brown, 823 F.2d 591 (D.C. Cir. 1987)	12
United States v. Hernandez, 862 F.2d 17 (2nd Cir. 1988), *cert. denied*, 489 U.S. 1032 (1989)	12
United States v. Lopez, 581 U.S. 1338 (9th Cir. 1978)	14
United States v. Tabacca, 924 F.2d 906 (9th Cir. 1991)	9, 12, 13, 14
United States v. Wilson, 894 F.2d 1245 (11th Cir. 1990), *cert. denied*, 497 U.S. 1029 (1990)	12
Vaca v. Sipes, 386 U.S. 171 (1967)	25
CONSTITUTIONS	
U.S. Constitution	
Art. III, § 2	16
Amdt 6	16
Amdt 7	16
FEDERAL STATUTES	
28 U.S.C. § 1254(1)	1
28 U.S.C. § 2101(c)	1
28 U.S.C. §§ 1331 and 1337	2
The National Labor Relations Act (NLRA), 29 U.S.C. § 151, et seq.	
NLRA § 8(b)(1), 29 U.S.C. § 158(b)(1)	2, 26
NLRA § 8(b)(2), 29 U.S.C. § 158(b)(2)	2, 26
NLRA § 9(a), 29 U.S.C. § 159(a)	2
The Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 401, et seq.	4
LMRDA § 3(a), 29 U.S.C. § 402(i)	2
LMRDA § 101, 29 U.S.C. § 411	3, 25, 26
LMRDA § 102, 29 U.S.C. § 412	2, 23, 26, 28
LMRDA § 609, 29 U.S.C. § 529	3, 25, 26

TABLE OF AUTHORITIES—Continued

Page

The Labor Management Relations Act of 1947, 29 U.S.C. § 173(d) 27

RULES

U.S. Sup. Ct. Rule 13.4 1
Fed. Rule Civ. Pro. 47(c) 11, 16
Fed. Rule Civ. Pro. 48 11

TEXTS

Hastie, Penrod, and Pennington, *Inside the Jury* (1987) 14, 15
Charlan Nemeth, *Interactions between Jurors as a Function of Majority v. Unanimity Decision Rules*, 7 *Journal of Applied Social Psychology*, 38-56 ..... 14, 15
Charles Hawkins, *Interaction Rates Among Jurors Aligned in Factions*, 27 *American Sociological Review* 689-91 (1962) 15

PETITION FOR A WRIT OF CERTIORARI

Laborers Union Local No. 324 ("the Union"), Jesse Thomas, Jesse Durran, Jr., Charles Evans, and Bob Davis respectfully pray that a Writ of Certiorari issue to review a portion of the Amended Order and Opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 14, 1995. The original Opinion and Order were entered on May 31, 1995. A Petition for Rehearing was denied, and a Suggestion for Rehearing *En Banc* was rejected by the Ninth Circuit on July 14, 1995, the same day the Opinion and Order were amended.

OPINIONS BELOW

The Order and Opinion of the United States Court of Appeals for the Ninth Circuit filed May 31, 1995 and amended July 14, 1995, is reported at slip op. 8401 and reprinted at App. A, p. 1a, *infra.* The Judgment of the United States District Court for the Northern District of California is not published and is reprinted at App. B, p. 21a, *infra.* The jury's verdict is reprinted at App. C, p. 23a, *infra.* The other Orders of the United States District Court and the Ninth Circuit are unpublished and reprinted at Apps. D-G, pp. 26a-30a, *infra.*

JURISDICTION

The Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit was entered on May 31, 1995 and was amended on July 14, 1995. A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was filed on June 13, 1995. On July 14, 1995, the Ninth Circuit denied the Petition for Rehearing, and rejected the Suggestion for Rehearing *En Banc.* The jurisdiction of the Court is invoked under 28 U.S.C. § 1254 (1). This Petition is timely filed with this Court under 28 U.S.C. § 2101(c) and U.S. Sup. Ct. Rule 13.4

STATUTES INVOLVED

The relevant statutory provisions are:

A. National Labor Relations Act, as amended, §§ 8(b)(1) and (2) and § 9(a), 29 U.S.C. § 158 (b)(1) and (2) and § 159(a).

B. The Labor Management Reporting and Disclosure Act, §§ 101, 102, and 609, 29 U.S.C. §§ 411, 412, and 529.

Pertinent portions of these statutory provisions are reproduced at Appendix H, p. 31a, *infra*.

STATEMENT OF THE CASE

This case presents the Court with three important issues for review: (1) the constitutional limit on a judge's discretion to dismiss a juror who has become an obstacle to a unanimous verdict for reasons that amount to minor concerns for the court's calendar; (2) the constitutionality of a punitive damages award against a labor union nearly 800 times greater than actual damages; and (3) the intractable contradiction between a union's obligations under the National Labor Relations Act, 29 U.S.C. §§ 158(b)(1) and (2) and 159(a) and the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 411, created by the decisions of the courts below.

Jurisdiction of the district court was invoked pursuant to 29 U.S.C. § 412 and 28 U.S.C. §§ 1331 and 1337. Local 324 is a labor union within the meaning of § 2(5) of the National Labor Relations Act (NLRA), 29 U.S.C. § 152(5), and § 3(a) of the Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 402(i).

This case arises from a dispute between Respondent Murray, a self-styled dissident member of Local 324, and several of the Union's officers and members. The dispute erupted in several boisterous confrontations and later claims by Murray that the Union had deprived him of a job referral to which he was entitled. Murray filed a complaint alleging that Petitioners Local 324, Jesse Thomas (the Union's president), Charles Evans (its busines manager and secretary-treasurer), Bob Davis (its recording secretary), and Jesse Durran, Jr. (a Union business representative), had violated LMRDA § 102 by infringing on Murray's rights to free speech and participation in union activities; that Local 324, Thomas, Evans, Davis, Durran, Jr., and Jesse Durran, Sr. (a former union mem-

ber, now deceased) had "committed, encouraged or actively participated in" a common law assault on Murray; that Local 324 had violated the duty of fair representation in several instances; and that, by obtaining an assessment of costs for an arbitration against Murray and by using pre-paid dues to collect that assessment, Local 324 had imposed a "fine or other discipline" without due process and in retaliation for protected activity in violation of LMRDA §§ 101(a)(5) and 609.

After a three and a half day trial, the district court granted judgment for Petitioners as a matter of law on the common-law assault claims against Local 324, Evans, and Davis; the duty of fair representation claims; and the § 101(a)(5) and 609 claims. Only the § 102 claims and the assault claims against Durran, Jr. and Durran, Sr. went to the jury. (ER 167-178). On most of these claims, Murray prevailed and was awarded $100.00 compensatory damages and $77,500 in punitive damages against defendants Local 324, Thomas, Durran, Jr., and Evans for violation of LMRDA § 102. Of the punitive damages, the jury allocated $50,000 against the union, $10,000 against Thomas, $10,000 against Durran, Jr. and $7,500 against Evans. The jury found that Durran, Jr. had not assaulted Murray, but that Durran, Sr. had, and awarded Murray $100 in compensatory damages.

Petitioners now seek this Court's review of three critical errors committed by the trial court and Ninth Circuit. First, the district court removed a known holdout juror during deliberations by a jury known by the court to be hung. Second, the district court and Ninth Circuit summarily affirmed the jury's imposition of punitive damages amounting to nearly 800 times the compensatory damage award for a claimed violation of the Labor-Management Reporting and Disclosure Act, without principled analysis of the substantive due process and national labor policy issues raised by the jury's award. Third, the district court allowed the jury to impose liability on Petitioners under the LMRDA for conduct required by its duty to fairly

represent other union members under the National Labor Relations Act, 29 U.S.C. §§ 141-197 (1988).[1]

After two days of deliberations and after having been apprised by a sequence of three notes that the jury was hung, the court removed one of the jurors, Mr. Giancoli. The court was on constructive notice that juror Giancoli was the only holdout on an otherwise unified jury. (ER 200-202; the jurors' notes are reprinted at App. I, p. 36a, *infra*). The first note indicated the jury could not reach a unanimous verdict and had scheduling conflicts. The second note, *from Giancoli alone*, stated that "the jury is *hopelessly* divided" (emphasis added). Fifteen minutes later, the other seven jurors signed a note, with Giancolis' signature conspicuously absent, indicating they believed they were close to a verdict and wanted to continue deliberations, thereby communicating that removal of Giancoli to resolve the scheduling conflict would also bring a speedy verdict. (ER 200-202; jurors' notes reprinted at App. I, 36a, *infra*). Despite clear indications that Giancoli was a lone holdout and notwithstanding defense counsel's objection to his removal on the ground that it could cause a mistrial and violate the right of the losing party to a unanimous verdict (ER 206), the judge removed the juror. The judge explained that Giancoli

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[1] Respondent's LMRDA claim rested on the assertion that Local 324 violated his rights by failing to dispatch him to a job through the hiring hall when union officials learned of the existence of a letter by an employer requesting him by name. Respondent was in a residential training program at the time, so was not present in the hiring hall and never collected the employer's letter or presented it to the Union, as required by the terms of the hiring hall provisions of the collective bargaining agreement. An arbitrator ruled that the union was prohibited from dispatching respondent under the circumstances because doing so would violate the duty of fair representation owed to the other union members who had complied with the hiring hall procedures. The National Labor Relations Board refused to issue a complaint in Respondent's subsequent unfair practice claim. Nevertheless, the district court allowed the jury to impose liability on the union under LMRDA § 102 for failing to dispatch Respondent, placing the union in an untenable conflict of statutory duties.

had to be excused to attend a half day previously-scheduled board of directors meeting.

Giancoli neither requested nor wished to be removed. (ER 230) He was neither ill nor suffering any physical or mental infirmity that would have interfered with his ability to complete his duties as a juror after a half-day's absence. He faced no family emergency. The only reason proffered for his dismissal was his need for a brief recess of the deliberations. When speaking to Giancoli after his dismissal, the judge stated, "I understand this is not the happiest of circumstances. There's no hung-jury or nearly hung jury that's a happy jury," Defense counsel asked the court to remind the jury they could seek clarification of any confusing issues and allow them to continue deliberations until Giancoli was forced to leave for his meeting, yet the judge dismissed Giancoli an hour and a half before he needed to leave. (ER 205-210; an excerpt of the record containing counsel's arguments is reprinted App. J, p. 40a, *infra.*)

In contrast to Ginacoli's swift dismissal, the court accommodated other jurors with scheduling conflicts. On the second day of deliberations, the jury was unable to deliberate in the afternoon because juror Bowers had to attend a job interview. Bowers was not dismissed. On the same day that juror Giancoli had to attend his afternoon meeting, juror DeWolke had to leave at 4:00 p.m. and juror Maagedenberg had to leave at 4:30 p.m., but the judge let both of them remain on the panel. Juror Giancoli, the lone holdout, was the only juror singled out for removal.

Once Giancoli was removed, the previously deadlocked jury returned a verdict in less than an hour. It found Durran, Jr. had not assaulted Murray, but that Local 324, Durran, Jr., Thomas, and Evans were liable for violating Murray's "free speech rights under the Labor-Management Reporting and Disclosure Act" and rendered a compensatory award of $100.00. It then imposed puntive damages totalling $77,500.00, nearly 800

times the compensatory award. $10,000.00 of the punitive damages were assessed against Durran, Jr. alone.

The punitive damages award was premised upon conduct found by an arbitrator to be required of the union by the governing collective bargaining agreement. Local 324 represents construction laborers whose terms and conditions of employment are governed by a collective bargaining agreement known as the Laborers Master Agreement for Northern California. That agreement sets forth a written hiring hall procedure under which Union members are assigned work in order of the placement of their names on an "out of work" board. Placement on the board is determined by the order in which members register for work. As members are dispatched to jobs, names of those remaining out of work move up on the board. To obtain a dispatch, employees must be "available for employment," meaning present in the hiring hall, according to the contractual provisions. The agreement allows deviation from the strict chronological sequence of dispatch if an employer requests a specific employee. However, severe restrictions are placed on that practice because it results in the denial of a job to the person at the top of the list, who has patiently waited for work in accord with a fair and orderly process.

Murray solicited such an employment request from an employer but did not receive it immediately. He then entered an educational program at the Laborer's Training Center, which is run by an organization separate and apart from Local 324 for the purpose of training Laborers throughout Northern California. While Murray was in the training center, the employer issued several name-call request letters, one of which named Murray. The other employees so named either contacted or were contacted by the employer. Each picked up the letter request directly from the employer and presented it to the Union to receive a dispatch. Murray, however, never picked up his letter and was not "available for employment" within the meaning of the collective bargaining agreement because of his commitment to finishing the training program and his absence from the hiring hall. He, therefore, did not

learn of the letter, did not bring it to the Union, and was not dispatched to work for the employer.

When Murray later learned of the letter, he filed a "hiring hall grievance" pursuant to the collective bargaining agreement, alleging that Local 324 was required to notify him at the training center of the existence of the letter. The grievance proceeded to arbitration. The arbitrator found that, not only was the Union *not required* by the collective bargaining agreement to notify Murray of the letter by phone, it was *prohibited* from doing so. The arbitrator found that had the union issued a dispatch to Murray under the circumstances, it would have violated its duty of fair representation to other members waiting on the list who were actually entitled to the work in question under the provisions of the hiring hall agreement. (Arbitrator McKay's ruling is reprinted at App. K, p. 46a, *infra*). Unhappy with that ruling, Murray filed an unfair labor practice charge against the union with the National Labor Relations Board. The NLRB, however, dismissed Murray's charge. Despite the findings of the arbitrator and the deference by the NLRB, the court submitted the "failure to refer" issue to the jury for consideration as a violation of the LMRDA.

The second group of events claimed by Respondent to have resulted in a violation of his LMRDA rights centered on events in the hiring hall. Murray repeatedly disrupted activities there by distributing a newsletter in a manner members found aggressive and irritating. On one occasion, when Murray occupied one of the two available tables during hiring hall hours, Evans asked him to cease harassing the members and began to gather up the newsletter. Murray hurled profane epithets at Evans and eventually the police were called. The police refused to remove Murray because there was no posted rule prohibiting solicitation and distribution. Concerned about the disruption of the hiring hall, Local 324 promulgated a narrowly tailored "no solicitation, no distribution" rule, applicable only inside the hiring hall and only during hiring hall hours. Durran, Jr. informed Murray that the

rule would be enforced. Murray was still able to hand out his literature at Union meetings, in the Union's parking lots, at the entrances to the hiring hall, and to mail it to whomever he wished.

The third set of events relied on by Respondent took place at a regularly scheduled membership meeting in October 1989. At that meeting, Murray questioned the accuracy of the minutes of the previous meeting, which he had not attended. The minutes were, nevertheless, approved by membership vote. When the president, Thomas, moved on to the next item on the agenda, Murray successfully sought recognition from the chair and continued to challenge the accuracy of the minutes. Thomas ruled Murray out of order and repeatedly asked him to be seated. When Murray refused, Thomas exercised his authority under the governing procedural rules, codified in the Uniform Local Union Constitution, to "discipline members who improperly obstruct and interfere with the orderly conduct of the business of the meeting" and asked Murray to leave. When Murray persisted in his interruption, Thomas asked the Sergeant at Arms to escort Murray from the meeting. Murray resisted, and Thomas requested assistance for the Sergeant at Arms. Durran, Jr. reached for Murray's brief case and Murray attacked him. Durran, Sr. pulled Murray's hair. Eventually the scuffle subsided, and Murray remained through the rest of the meeting.

The jury determined that Durran, Jr. did not assault Murray. As Durran, Jr. was only alleged to have violated Murray's rights by assaulting him and by participating in the failure to refer Murray to the employer, the jury's $10,000 punitive damages award against Durran, Jr. can only be based on the jury's findings regarding the employer referral issue.

After the verdict, Petitioners moved for Judgment as a Matter of Law and for a new trial, arguing that removal of the juror was not for cause and violated defendants' right to a unanimous verdict, the evidence did not support the verdict, the punitive damages award was excessive in

violation of defendants' right to due process, and the submission of the employer referral issue to the jury was improper, as it placed the union in the untenable position of choosing between irreconcilable statutory duties.

The trial court denied the motions, finding that the juror was properly removed, the punitive damages award was constitutionally acceptable because free speech rights violations are "difficult to put a price tag on," and that the referral issue was properly sent to the jury as a basis for the LMRDA claim.

On appeal, the Ninth Circuit affirmed, *Murray*, slip op. at 8401 (9th Cir. July 14, 1995). In derogation of its own earlier decision in *United States v. Tabacca*, 924 F.2d 906 (9th Cir. 1991), and in conflict with the prevailing rule among the federal circuits, the court found removal of the juror was proper, despite the strong inference that the judge was aware of, and motivated by, the fact that Giancoli was a holdout. Originally, the Ninth Circuit did not address *Tabacca* at all. When the direct conflict between the two cases was called to its attention in the Petition for Rehearing, the court amended its opinion, distinguishing *Tabacca* on the grounds that the issues in this case were so complex that any further delay would "dull the juror's memories and concentration." *Murray*, slip op. at 8406. However, the material facts of *Tabacca* are nearly identical to those of this case.

The court also summarily affirmed the award of punitive damages. *Id.*, slip op. at 8417-18. Applying its decision in *Morgan v. Woessner*, 997 F.2d 1244 (9th Cir. 1993), *cert. dismissed, sub nom. Searle v. Morgan*, 126 L.Ed.2d 640 (1994), the court determined that the due process concerns articulated by this court in *Paramount Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), were satisfied because (1) the judge adequately instructed the jury regarding the purpose of punitive damages; (2) the trial court adequately explained its reasons for upholding the verdict notwithstanding the disparity between the actual and punitive damage awards, namely that free-

dom of speech violations are "hard to put a price tag on;" and (3) the award was not unconstitutionally excessive because of "the seriousness of the infringement on Murray's freedom of speech." *Murray*, slip op. at 8418.

That fleeting reference to the "seriousness" of the "infringement" constituted the Ninth Circuit's entire analysis of whether the punitive damages award exceeded the amount necessary to accomplish the goals of punishment and deterrence. The appellate court provided no factual analysis addressing the factors articulated in *Haslip* and *TXO Production v. Alliance Resources*, —— U.S. ——, 125 L.Ed.2d 366 (1993), and enunciated no other factors serving a similar purpose. The court neglected to explain how it concluded that Murray's free speech rights were violated, much less how it determined that the violations were serious, what constitutes a "serious" violation, or how the policies underlying the imposition of punitive damages were served. The Ninth Circuit did not address counsel's argument that imposition of punitive damages in this context violated the national labor policy disfavoring punitive damage awards against unions, articulated by this Court in *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979).

The court acknowledged that the failure to notify Murray of the employer letter and promulgation of the no-solicitation no-distribution rule might not be permissible bases for an LMRDA claim. *Murray*, slip op. at 8416. The court nevertheless held there was substantial evidence in the record to support the jury's finding of free speech violations by vaguely alluding to evidence regarding events at the membership meeting, attempted confiscation of the newsletters, and the use of Murray's prepaid dues to collect costs assessed against him in an arbitration he lost. Use of the dues was found by the trial court not to constitute a LMRDA violation because the costs were assessed by a neutral arbitrator after a full and fair hearing. *Id.* The court made no effort to determine what part of the jury's award rested on findings regarding the employer referral issue, and never resolved whether sending that issue to the jury was proper.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S DETERMINATION THAT THE REMOVAL OF A KNOWN HOLDOUT JUROR DURING DELIBERATIONS AT A TIME WHEN THE JURY WAS HUNG WAS NOT AN ABUSE OF DISCRETION CONFLICTS WITH DECISIONS OF THE OTHER FEDERAL CIRCUITS AND VIOLATED DEFENDANTS' CONSTITUTIONAL AND FEDERAL STATUTORY RIGHT TO A UNANIMOUS VERDICT.

The Ninth Circuit's ruling in this case, upholding the removal of juror Giancoli despite evidence creating a strong inference that the trial court was motivated by an improper purpose to eliminate an obstacle to a quick verdict, is in direct conflict with the weight of authority in the other federal circuits that have passed on the issue.

It is well-settled law that litigants in civil cases in the federal courts have a constitutional right under the Seventh Amendment to a decision by a unanimous jury. *Andres v. United States,* 333 U.S. 740, 748 (1947); *Johnson v. Louisiana,* 406 U.S. 356, 370-71 (1972) (Powell concurring); *American Publishing Co. v. Fisher,* 166 U.S. 464, 467-68 (1897). F.R.C.P. 48 codifies that right. Absent a waiver by the defendant, which is lacking in this case, the right to a unanimous verdict must be preserved.

F.R.C.P. 47(c) provides that a court "may for good cause excuse a juror from service during trial or deliberation." The Committee Note to the amendment that added subsection (c) indicates that "sickness, family emergency or juror misconduct that might occasion a mistrial are examples of appropriate grounds for excusing a juror." The Note emphasizes, however, that good cause for dismissal does not include that a "juror refuses to join with fellow jurors in reaching a unanimous verdict." *Id.* The federal circuits that have addressed the juror discharge issue have been very careful to note that even a hint that a juror is a holdout against

an otherwise unanimous verdict precludes her dismissal. *United States v. Hernandez*, 862 F.2d 17, 23 (2nd Cir. 1988) *cert. denied*, 489 U.S. 1032 (1989); *United v. Essex*, 734 F.2d 832, 844 (1984); *United States v. Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987); *United States v. Wilson*, 894 F.2d 1245, 1250 (11th Cir. 1990) *cert. denied*, 497 U.S. 1029 (1990); *Green v. Zant*, 715 F.2d 551, 556 (11th Cir. 1983).

In *Hernandez*, the trial court purported to remove a lone holdout juror for "just cause" under Fed Rule Crim Procedure 23(b), because the juror was mentally ill and disruptive. The Second Circuit reversed and remanded for a new trial because the judge was on notice the juror was a holdout and it was "not clear" from the record that the juror was removed for mental illness, rather than because he refused to join the majority. 862 F.2d at 23. The court stated, "That a juror may not be removed because he or she disagrees with the other jurors because of the merits of the case requires no citation. Moreover, removal of the sole holdout for acquittal is an issue at the heart of the trial process and must be meticulously scrutinized." *Id.* Other circuits are in accord.[2]

Reasoning similarly, the Ninth Circuit previously ruled in *United States v. Tabacca*, 924 F.2d 906 (9th Cir. 1991), that the trial court abused its discretion by removing a holdout juror because he was forced to miss one

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[2] See, e.g., *Brown*, 823 F.2d at 596 ("a court may not dismiss a juror during deliberations if the request for discharge stems from doubts the juror harbors about the sufficiency of the evidence"); *Essex*, 734 F.2d at 844 (defendant's right to a unanimous verdict violated because of *possibility* that absent juror was "a lone holdout" in the face of a "hostile pro-conviction majority"); *Wilson*, 894 F.2d at 1250 (upholding dismissal of ill juror because "the record does not present even the slightest basis to believe that this juror was a holdout juror or that the jury had reached any sort of impasse in its deliberations"); *Green v. Zant*, 715 F.2d at 556 ("Trial courts have discretion to dismiss ill jurors, but there is no discretion whatever to dismiss such a juror who is *not* in fact ill or otherwise incapacitated").

half day of deliberations due to a transportation problem. The court held that the additional half-day delay was "unlikely to induce dull memories on the part of the jurors," even though it followed a three-day weekend. *Id.* at 915. As with the current case, the trial was short (3.5 days here, 2.5 days in *Tabacca*) and the delay resulting from the juror's absence was not due to illness, mental or physical incapacity, or family emergency. The current case is distinguishable only because the delay caused by Giancoli's absence would not have followed a three-day weekend but, rather, would have resulted in less of a gap in deliberations than was permitted in *Tabacca*. *Tabacca* held that a temporary interruption in deliberations due to a transportation problem did not constitute just cause for removal. *Id.*

Despite the uncanny similarities between *Tabacca* and the instant case, and notwithstanding the authority throughout the federal appellate courts that any indication a juror is a holdout precludes removal, the Ninth Circuit reversed course in this case and ruled that the judge did not abuse his discretion my removing juror Giancoli. The sequence of notes from the jurors put the judge on notice that Giancoli was a lone holdout. Giancoli's note, signed by him alone, declared that the jury was "hopelessly divided." A mere fifteen minutes later, the remaining jurors, without Giancoli's signature, submitted a note indicating that they were close to a verdict and wanted to continue deliberations. See App. I, p. 36a, *infra*. That Giancoli was a solitary obstacle to a verdict could not have eluded the court.[3]

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[3] The judge's statements to Giancoli further indicate he was well aware that Giancoli's presence on the jury was preventing a unanimous verdict: "I understand this is not the happiest of circumstances. There's no hung or almost hung jury that's a happy jury . . . Having been in this business for a number of years, [I] can tell from the look on the juriors' faces whether they're having difficulty or not, and so I don't envy you the service that you have rendered. I know it has been difficult." (ER 214).

The Ninth Circuit's tardy attempt to distinguish *Tabacca* is unconvincing. The court cursorily justified its deviation from its own precedent by declaring that the issues in the present case were "more complicated than those in *Tabacca*, increasing the risk that further disruption of the deliberations process would dull the jurors' memories and concentration." Slip op. at 8415. That justification is unpersuasive, given the brevity of the trial, the relatively straightforward issues presented, and the gravity of the constitutional right to a unanimous verdict. The Ninth Circuit's brief discussion justifying the removal as an exercise of the trial court's discretion to "control its docket," *id.*, improperly elevates court administrative considerations over defendants' constitutional and federal statutory rights.

Removal of a juror during deliberations "jeopardizes the right to a unanimous verdict." *Essex*, 734 F.2d at 840. Unanimity is essential to the proper functioning of the jury system. *Id.* at 841. As the Ninth Circuit itself has eloquently stated

> A rule which insists on unanimity furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury. The requirement of pury unanimity thus has a precise effect on the fact-finding process, one which gives particular significance and conclusiveness to the jury's verdict. *United States v. Lopez*, 581 U.S. 1338, 1341 (9th Cir. 1978).

Removing a holdout juror creates the "danger that dissenting views may not be heard, debated, and resolved by the process of arriving at a unanimous verdict," *Essex*, 734 F.2d at 841. Those judicial observations have been corroborated empirically. Studies have shown that the deliberative process is fundamentally different when the rule of decision is changed from unanimity to majority.[4]

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[4] See Hastie, Penrod, and Pennington, *Inside the Jury* (1987); Charlan Nemeth, *Interactions between Jurors as a Function of Majority v. Unanimity Decision Rules*, 7 *Journal of Applied Social Psychology*, 38-56.

Juries operating under a majority decision rule are less concerned with testing the justifiability of their views and defending them against minority viewpoints.[5] One study determined that majority-rule juries do not reach consensus unless required to, decisions are reached as soon as a sufficient majority is obtained, regardless of whether the minority is still viably arguing for a contrary result, deliberations are shorter and debate is less robust than when unanimity is required.[6] Other studies also have concluded that deliberations in majority-rule juries are shorter, and have found that there is less effort by jurors to correct factual inaccuracies espoused by other jurors, and less detailed discussion.[7] It is relevant in that regard that, in the instant case, once Giancoli was removed, the previously deadlocked jury returned a verdict in less than an hour. Unsurprisingly, juries under a majority decision rule are less likely to hang.[8] To the detriment of the adjudicatory process, non-unanimous juries also are more likely to commit errors of law.[9]

The holdout juror plays a special role in the jury's search for justice. Studies have shown that a holdout juror's rate of interaction with other jurors and the vehemence of his advocacy are inversely proportional to the size of the minority to which he belongs.[10] A holdout juror may fight hardest and most effectively when he is alone. His opinion deepens the jury's examination of the issues before it and promotes correct application of the governing law. Those features of jury deliberations are critical to a just adjudication of disputes. It will never be known what would have happened had Giancoli been allowed to return to the jury, even if just for the remaining

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[5] Nemeth at 54-55.

[6] *Id.*

[7] Hastie at 228.

[8] *Id.*

[9] Hastie, et al. at 228-29.

[10] Charles Hawkins, *Interaction Rates of Jurors Aligned in Factions*, 27 *American Sociological Review* 689-91 (1962).

hour before he had to leave for his board meeting. Alone and under time constraints, he may have developed a pivotally persuasive argument and shifted the direction of the jury's reasoning.

Given the significant difference one juror can make in jury deliberations, it is critical that the admonition in the commentary to F.R.C.P. 47(c), that refusal to agree to a verdict does not constitute just cause for removal, be rigorously observed. To allow a judge, on pretext of controlling his docket, to remove a juror without regard to the unanimity requirement drastically undermines the effectiveness and validity of the jury process.

As Justice O'Connor has observed:

> Our abiding faith in the jury system is founded on long-standing tradition reflected in the constitutional text, see U.S. Const Art III, § 2, Amdts 6, 7, and is supported by sound considerations of justice and democratic theory. The jury system long has been a guarantor of fairness, a bulwark against tyranny, and a source of civic values.

TXO, 125 L.Ed.2d at 389 (O'Connor dissenting). If citizens are to continue to put their faith in the jury system which has served so well for more than two centuries, they must be able to depend on reviewing courts to ensure that juries are not manipulated by trial judges for mere administrative purposes, such as "controlling the docket." Allowing the lower courts' decisions in this case to stand renders the constitutional right to a unanimous verdict illusory and grants trial courts excessive discretion to remove jurors in order to hasten deliberations. Such a denigration of the hallmark of American jurisprudence should not be permitted.

II. THE JURY'S IMPOSITION OF PUNITIVE DAMAGES AMOUNTING TO NEARLY 800 TIMES THE COMPENSATORY DAMAGE AWARD AND THE CURSORY REVIEW OF THAT AWARD BY THE TRIAL COURT AND COURT OF APPEALS VIOLATED PETITIONERS' RIGHT TO SUBSTANTIVE DUE PROCESS UNDER THE FIFTH AMENDMENT AND CONTRAVENED THIS COURT'S ENUNCIATION OF THE NATIONAL LABOR POLICY AGAINST WEAKENING UNIONS AND PENALIZING DUES-CONTRIBUTING MEMBERS FOR ALLEGED UNION MISCONDUCT.

The Ninth Circuit's summary affirmance of the trial court's equally insubstantial review of the jury's imposition of a grossly excessive punitive damage award violated Petitioners' right to due process. The right to appellate review of punitive damage awards is an empty one if the reviewing court does not engage in a meaningful substantive analysis. Neither the district court in this case nor the Ninth Circuit articulated an adequate justification for upholding the jury's award of damages amounting to nearly 800 times the nominal actual award imposed. The mere invocation of case law and a ritual of judicial blessing cannot satisfy the constitutional right to due process. The Constitution surely confers a right to more than such a charade.

This Court's pronouncements regarding the due process limitations on punitive damages have left the federal courts in a state of conflict and uncertainty. Not only is it unclear what minimum procedures are constitutionally required in order to adequately ensure that punitive damage awards are rationally imposed, but it is also unsettled among the courts whether the Due Process Clause only confers a bare procedural right to review, or also a substantive right to a correct determination of whether a punitive damage award is reasonable. The unusual features of this case present an opportunity for the court to resolve those conflicts and rule definitively that in order for the procedural right to judicial review to have meaning, the review standards must be substantively defensible.

The award of exemplary damages is an exercise of state power and must comply with the Due Process Clauses of the Fifth and Fourteenth Amendments. *Honda Motor Co. v. Oberg*, 512 U.S. ——, 129 L.Ed.2d 336, 351 (1994). This Court has stated that punitive damages must be no greater than necessary to effectuate the goals of punishment and deterrence. *Haslip*, 499 U.S. at 21. Excessive punitive damage awards violate the right to due process. *Oberg*, 129 L.Ed.2d 336, 342 (1994); *TXO*, 509 U.S. ——, 125 L.Ed.2d 379 (1993); *Haslip*, 499 U.S. at 18-20 (1991).

It appears to be settled that the Due Process Clause confers a right to judicial review of punitive damages for reasonableness. See *Oberg*; *TXO*, 125 L.Ed.2d at 387 (Scalia concurring); *id.* at 393 (O'Connor dissenting). However, the opinions of this Court have been split over whether there is also a substantive due process right to a correct determination of reasonableness. The plurality in *TXO* and the majority in *Haslip* both passed judgment not only on whether the procedures were adequate but, also, on whether application of those procedures below resulted in awards that were so excessive as to violate due process. *Haslip*, 499 U.S. at 23 ("while the monetary comparisons are wide and, indeed, may be close to the line, the award here did not lack objective criteria. We conclude, after careful consideration, that in this case it does not cross the line into the area of constitutional impropriety."); *TXO*, 125 L.Ed.2d at 382 ("the punitive damages award in this case is certainly large, but in light of the amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and petitioner's wealth, we are persuaded that the award was so 'grossly excessive' as to be beyond the power of the State to allow" footnote omitted.)

However, Justice Scalia, concurring in the judgment in *TXO*, joined by Justice Thomas, stated clearly his belief that the Due Process Clause confers no substantive

right to a correct determination of reasonableness but, rather, only a procedural right to review: "To say (as I do) that 'procedural due process' requires judicial review of punitive damages awards for reasonableness is not to say that there is a federal constitutional right to a substantively correct "reasonableness" determination . . . *judicial* assessment of their reasonableness is a federal right, but a *correct* assessment of their reasonableness is not." *TXO*, 125 L.Ed.2d at 388-389 (emphasis in original).

In her dissent, Justice O'Connor expressed a contrary position, arguing that appellate courts must not only scrutinize the procedures used by the trial court, but also the size of the award in light of the policies promoted by the imposition of exemplary damages. *TXO*, 125 L.Ed.2d at 389-393 (O'Connor dissenting).

In *Oberg*, a majority of the court joined an opinion stating that "our recent cases have recognized that the Constitution imposes a substantive limit on the size of punitive damage awards." 129 L.Ed.2d at 342. Justice Ginsberg, however, joined by Chief Justice Rehnquist, writing in dissent, stated "a judgment that is a product of fair procedures . . . is entitled to a strong presumption of validity" which "should be irrebuttable or virtually so." 129 L.Ed.2d at 353, quoting *TXO*, 125 L.Ed.2d 366.

That split of opinion on the Court, regarding whether the Due Process Clause only imposes limits on the procedures that may be employed in assessing punitive damages or also imposes a substantive limit on the size of such awards, has left the lower courts uncertain how to proceed. A careful examination of the cases indicates that, while many of the courts that have addressed the issue carefully refrain from taking a position on whether litigants have a substantive right to a correct determination of reasonableness, they invariably engage in a substantive review of punitive damages awards, looking to *Haslip* and *TXO* for the applicable guidelines.[11]

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[11] See, e.g., *Dunn v. Hovic*, 1 F.3d 1371 (3d Cir. 1993) ("We may take from *Haslip*, therefore, that a punitive award that is

Neither *Haslip* nor *TXO* specified what factors a court must consider when determining if an award of punitive damages is reasonable. The procedures upheld in those cases apparently are not constitutionally mandated, but they provide some insight into what factors are relevant and constitutionally permissible to consider regarding whether an award is reasonable. A look at the policies advanced by those procedures makes apparent that the trial court's and Ninth Circuit's review of the jury's verdict in this case were woefully constitutionally inadequate.

Haslip, *TXO*, and *Oberg* indicate that, at a minimum, due process requires appellate review of punitive damages awards. In *Haslip*, the Court upheld the Alabama process for the imposition of punitive damages, specifically approving the court's application of the following considerations when reviewing punitive damages awards:

> (a) Whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct,

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greater than reasonably necessary to punish and deter violates substantive due process." The court found that interpretation to be corroborated by the fact that in *TXO*, "the plurality opinion relied on a general concern of reasonableness."); *Robertson Oil Co., Inc. v. Phillips Petroleum Co.*, 14 F.3d 373 (8th Cir. 1993), *cert. denied*, 128 L.Ed.2d 677 (1994) (noting split of opinion in *TXO*, but resting its opinion on the compliance of Arkansas procedures with principles from *Haslip* and noting that the trial court made specific factual findings to justify punitive damages award); *Klein v. Grynberg*, 44 F.3d 1497 (10th Cir. 1995) (finding that *TXO* applies a general standard of "reasonableness" to review of punitive damages awards and mandates application of the factors considered by the *TXO* Court to justify the punitive damages award in that case.); *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377 (5th Cir. 1991) (identifying both a substantive and procedural inquiry in *Haslip* and stating, "Under *Haslip*, an award of punitive damages does not meet constitutional requirements unless the circumstances of the case indicate that the award is reasonable.") *Johnson v. Hugo's Skateway*, 949 F.2d 1338 (4th Cir. 1991) (remanding for reconsideration in light of *Haslip* factors).

> the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the 'financial position' of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

Haslip, 499 U.S. at 22.

In *TXO*, a plurality on this Court approved of somewhat less rigorous factors applied on appeal by the Virginia Supreme Court: "(1) The potential harm that TXOs' actions could have caused; (2) the maliciousness of TXO's actions; and (3) the penalty necessary to discourage TXO from undertaking such endeavors in the future." *TXO* at 376. The plurality in *TXO*, like the majority in *Haslip*, refrained from enshrining the particular criteria employed as constitutionally required, but the Court found that the procedures applied by the Virginia Supreme Court were sufficient to satisfy the Court's "general concern of reasonableness." *Id.* at 379.

The plurality engaged in a substantive analysis, however, applying the principles enunciated by the Virginia court, and upheld the punitive damage award in light of "the amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit and petitioner's wealth." 125 L.Ed.2d at 382.

Unlike the courts in either *Haslip* or *TXO*, the Ninth Circuit in the instant case articulated absolutely no criteria by which it reviewed the punitive damage award against Petitioners for reasonableness. This Court's holding that a "general concern for reasonableness" must drive the appellate court's analysis surely requires more than a mere conclusory blessing by an appellate court

panel. The Ninth Circuit failed to explain its understanding of what facts supported an award of punitive damages, what constituted a violation of respondent's free speech rights, why that violation was "serious," and why due process is not offended by a punitive damage that is nearly 800 times the actual damages awarded by the jury.

The District Court's cursory justification for upholding the award, that speech violations are "hard to put a price tax on," is specious, at best. The jury did put a price on the injury it believed the plaintiffs suffered: $100.00, apparently finding the plaintiff did not suffer serious damages as a result of any infringement on his rights.[12]

Moreover, if this Court were to agree that speech rights violations are incapable of monetary measurement, then it is impossible to assess whether the punitive damages award is rationally related to the harm actually or potentially suffered. The plurality in *TXO* concluded that a court may consider not only actual but potential harm caused by a defendant's conduct when reviewing punitive damage awards for reasonableness. 125 L.Ed.2d at 380-81. However, if the alleged violation cannot, due to its nature, be measured monetarily, then any assessment of the proportionality of punitive damages to actual harm, whether already incurred or potential, must, of necessity, be utterly arbitrary. It is against such an arbitrary deprivation of property that the due process clause is directed. *TXO*, 125 L.Ed.2d at 388 (Scalia concurring), *id.* at 380-82 (plurality opinion). Upholding the punitive damages award in this case on such paltry review exacerbates the danger inherent in a system that allows juries to impose punitive damages: that passion or prejudice rather than legitimate concerns

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[12] Taking into consideration inflation and the tremendous increase in wages and the cost of living since the birth of this nation, one may safely characterize an award of $100.00 compensatory damages as equivalent to the award of $1.00 nominal damages at common law. Such an award acknowledges that a plaintiff's rights were, technically, violated, but also sends the message that the actual harm suffered was so small as to be non-compensable.

of punishment for, and deterrence of, culpable conduct will drive the jury.

This Court has previously held that punitive damage awards against unions for duty of fair representation violations flout national labor policy. *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979). Although such awards might encourage unions to process individual grievances, the court reasoned, the potential benefits were offset by the possibility that "punitive awards could impair the financial stability of unions and unsettle the careful balance of individual and collective interests which this Court has previously articulated in the unfair representation area." *Id.* at 48. Damages in the DFR context are designed "to make the injured employee whole." *Id.* Prohibiting punitive damages in such cases preserves the "careful accommodation" between individual and collective rights by affording "individual employees redress for injuries caused by union misconduct without compromising the collective interests of union members in protecting limited funds." *Id.* at 50.

The Court's concerns in the DFR context are equally applicable to claims under § 102 of the LMRDA. Punitive damage awards for alleged violations by the union could "deplete union treasuries, thereby impairing the effectiveness of unions as collective-bargaining agents. Inflicting this risk on employees, whose welfare depends upon the strength of their union, is simply too great a price for whatever deterrent effect punitive damages may have." *Id.* at 50-51.

As in the DFR context, the goal of a damages award in the context of an alleged violation of individual members' free speech rights should be to make the aggrieved party whole. The jury in this case determined that $100.00 would serve that purpose. The punitive damage award is excessive and violates the principles guiding this Court in *Foust*. Moreover, this Court invalidated a punitive damage award when it was imposed for conduct that the defendant reasonably believed was required of it by law. See *Southwestern Telegraph and Telephone Co. v. Danaher*, 238 U.S. 483, 489 (1914). Similarly, in this

case the Union reasonably believed it was prohibited from dispatching Murray under the circumstances.

It is significant that the LMRDA does not even contain a provision authorizing punitive damages for § 102 claims. There is no principled reason to distinguish *Foust* in this context. As with DFR violations, a party whose free speech rights have been violated (which Petitioners maintain Respondent's were not) must be made whole. However, as in the DFR context, that individual's interests must be balanced against the interests of other dues paying members in having a strong representative. To impose punitive damages for the claimed violations of respondent's free speech rights, especially in such gross disproportion to actual damages, would subvert the interests of the other members of the union to the respondent's desire to punish the union for a minor infringement on his rights. Such an award violates the national labor policy articulated in *Foust*.

The implication of national labor policy in this case underscores the necessity of requiring a meaningful substantive review of punitive damage awards on appeal. The Ninth circuit made no effort to justify upholding the punitive damage award in this case in the face of that policy. It is not enough to grind a case through the appellate docket and issue a judgment. To satisfy due process, courts must, at a minimum, assess the nature and degree of the harm caused or potentially caused, the proportionality of the punitive award to that harm, and examine whether the punitive damage award is reasonably calculated to punish and deter the perpetrator. Moreover, a court must assess whether other relevant national policy is contravened by the imposition of a punitive damage award.

Finally, as discussed more fully below, to allow a punitive damage award in this case where such awards are not allowed for duty of fair representation violations will encourage unions to commit DFR violations, precisely to avoid the risk of substantial liability by those claiming dissident status. Such a result directly contravenes the

mandate implicit in the establishment of exclusivity of representation in NLRA Sec. 9(a). See *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). Encouraging DFR violations in that way will upset the "careful accommodation" sought to be preserved by *Foust* at least as severely as imposing punitive damage awards for DFR violations would have. That result is intolerable and makes a mockery of the Court's reasoning in *Foust*.

III. THE NINTH CIRCUIT HAS CREATED AN IRRECONCILABLE CONFLICT OF STATUTORY DUTIES FOR PETITIONER AND OTHER UNIONS BY AFFIRMING THE SUBMISSION TO THE JURY FOR CONSIDERATION AS AN LMRDA VIOLATION CONDUCT THAT WAS REQUIRED OF THE UNION BY THE NATIONAL LABOR RELATIONS ACT IN ORDER TO AVOID VIOLATING THE DUTY OF FAIR REPRESENTATION OWED TO OTHER UNION MEMBERS.

The trial court in this case sent the claims that the Union and Durran, Jr. violated respondents free speech rights under LMRDA § 101(a)(1) and (2) to the jury, despite having found that the failure to refer was not a duty of fair representation violation and did not constitute discipline under LMRDA §§ 101(a)(5) and 609. The jury's punitive damages award against Durran, Jr. in the amount of $10,000 rests entirely on a finding of liability under that theory.

The complaint alleged that Durran, Jr. assaulted Respondent at the membership meeting and that he received a call that an employer wanted to hire Respondent, but failed to notify him. Plaintiff's counsel at trial also argued that the failure to refer was a DFR violation and constituted discipline without due process and in retaliation for protected activity in violation of LMRDA §§ 101(a)(5) and 609.

The court granted judgment as a matter of law for Petitioners on several issues, including the DFR, finding that the union had no duty to inform respondent of the referral letter. (ER 170). The court also ruled that the

failure to refer was not discipline within the meaning of the LMRDA. (ER 170-74) The jury determined that Durran, Jr. did not assault Murray. (Jury Verdict, reprinted at App. C, p. 23a, *infra*). Accordingly, the only basis for imposing liability and punitive damages on Durran, Jr. was under the theory that he participated in the failure to refer Respondent to the employer through the hiring hall and that failure infringed on Respondent's § 101(a)(1) and (2) rights, in violation of § 102.

In *Breininger v. Sheet Metal Workers Int'l Assn., Local Union No. 6*, 493 U.S. 67 (1989), this Court held that "by using the phrase 'otherwise discipline' Congress did not intend to include all acts that deterred the exercise of rights protected under the LMRDA, but rather meant instead to denote only punishment authorized by the Union as a collective entity to enforce its rules." *Id.* at 91. Consequently, a failure to refer through the hiring hall allegedly in rataliation for political opposition to union leadership was held not to provide a basis for an LMRDA claim under §§ 101(a)(5) or 609. This Court explicitly refrained from ruling on whether such a failure to refer could state a claim under § 102. *Id.* at 94, n.18.

Regardless of whether, in the abstract, a failure to refer could support such a claim, it could not do so in cases where, as here, referral is *prohibited* by the parties' collective bargaining agreement. Protecting the free speech rights of union members is unquestionably of paramount importance, but the LMRDA must not be interpreted to allow union members to circumvent the collective bargaining agreement and force the union to violate the NLRA merely by claiming that they are "dissidents."

A union must comply with the provisions of its hiring hall agreement. If it fails to do so, it violates the NLRA. *Breininger*, 493 U.S. at 76, n.3 ("Deviation from clear and unambiguous standards in refusing to refer an employee for work establishes a prima facie violation of § 8(b)(1)(A) and 8(b)(2) of the NLRA); *NLRB v. Iron Workers Local 75*, 583 F.2d 1094 (9th Cir. 1978). In this case, an arbitrator determined that the hiring hall

provisions of the collective bargaining agreement prohibited the Union from issuing the job dispatch to Respondent under the circumstances presented in this case. See McKay Arbitration Award, reprinted at App. K., p. 46a, *infra*. The arbitrator reasoned that if the union had given respondent the special treatment he demanded, the union would have breached its duty to fairly represent other unit members who were in the hiring hall when the work became available and who were actually entitled to the job dispatch while Respondent was not. *Id.*

Significantly, Respondent was represented by legal counsel at that aribitration hearing and never sought to vacate the award. Accordingly, the award is final and binding. As such, it became part of the terms of the collective bargaining agreement. See *United Paperworkers v. Misco*, 484 U.S. 29, 38 (1987) ("[I]t must be remembered, that grievance and arbitration procedures are part and parcel of the ongoing process of collective bargaining. It is through these processes that the supplementary rules of the plant are established"). Not only the parties to the CBA, but the district court and jury were bound by that ruling. *Id.* at 37-38.

National labor policy, as expressed in the Labor Management Relations Act of 1947, 29 U.S.C. § 173(d), favors the "private settlement of disutes without the intervention of government." *Misco*, 484 U.S. at 37. Pursuant to that policy, this Court has noted that "because the parties have contracted to have disputes settled by an aribtrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept." *Id.* at 37-38. This Court continued:

> [A]n arbitrator must find facts and a court may not reject those findings simply because it disagrees with them. The same is true of the arbitrator's interpretation of the contract; . . . the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the

> contract . . . So, too, where it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect. If the courts were free to intervene on these grounds, the speedy resolution of grievances by private mechanisms would be greatly undermined.

Id. at 38 (citations omitted). Thus, the District Court was bound by Arbitrator McKay's determination that the Union was prohibited from dispatching respondent under the circumstances of his absence from the hiring hall. To allow the court to send the referral issue to the jury as a possible LMRDA violation, in effect, allows the court to vacate the arbitrator's award, which it lacked authority to do.

In addition, the District Court's decision to send the referral issue to the jury conflicts with its rulings on Petitioners' F.R.C.P. 50 Motions. Both the trial court and the Ninth Circuit agreed that the union had no duty to notify respondent of the letter. Nevertheless, the trial court sent the failure to refer to the jury as a potential LMRDA § 102 violation. In response to counsel's argument on appeal that the failure to refer could not support a § 102 claim, the Ninth Circuit remarked only "possibly so," but neither analyzed nor passed judgment on the issue. *Murray*, slip op. at 8416.[13]

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[13] The Ninth Circuit attempted to justify its affirmance of the jury's verdict by asserting that the finding of liability for a § 102 violation was supported by other evidence, relating to attempted confiscation of the newsletter, use of Respondent's prepaid dues to collect the costs assessed against him in arbitration, and conduct during the membership meeting. However, it was amply demonstrated that Respondent's distribution of literature interfered with union business and the union was within its rights under the LMRDA and the collective bargaining agreement when it restricted distribution of literature inside the hiring hall during hiring hall hours. The District Court found and the Ninth Circuit affirmed that the Union's use of respondent's dues to collect costs previously assessed was permissible and did not violate rsepondent's rights, and the conduct at the meeting was an exercise of administrative authority properly wielded under the governing rules of

In *NLRB v. Iron Workers, supra,* the Ninth Circuit held that if a union has complied with its written hiring hall provisions, the union's motive for doing so is irrelevant and may not be inquired into. Since the union's motive for following its own procedures is the only possible basis for respondent's LMRDA claim, at least against Durran, Jr., the judge erred by submitting the issue to the jury.

If the Union had dispatched Respondent despite his absence from the hiring hall, it would have committed a DFR violation under the NLRA. If the trial court's submission of the union's compliance with its hiring hall provisions to the jury is upheld, the union will be punished under the LMRDA for refusing to violate its duty of fair representation under the NLRA. As this court has previously explained

> When interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the legislature.

Kokoszka v. Belford, 417 U.S. 642, 650 (1974) (citations omitted). Thus, the LMRDA must be applied in harmony with the rest of the NLRA.

The jury's verdict in this case places the union in the untenable position of having to choose between which of two federal statutes to violate in the future. This Court has held that punitive damages may not be imposed on a union for violating the duty of fair representation. *Foust,* 42 U.S. at 50-51 (see discussion *supra*). As a result, from a pure risk-aversion standpoint, the union may be virtually forced to breach its duty of fair representation

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order. Finally, the jury found that Murray, not Durran, Jr., was the aggressor in the altercation that occurred at the union meeting. Thus, there was no other basis in the record to support the jury's verdict.

to the members as a whole simply to avoid ruinous punitive damage awards by members who demand special and contractually-prohibited rights to job referrals merely because they claim to be dissidents. It is inconceivable that when Congress enacted two federal statutes (the NLRA and LMRDA) to govern the same conduct of unions, it would have done so knowing or even anticipating that compliance with one could lead to ruinous punitive damage awards for the alleged violation of the other. Such a result not only surely flouts Congressional intent, but also violates fundamental tenets of statutory construction embraced by this Court.[14]

Thus, the verdict in this case should be set aside in order to ensure consistent application of the federal labor statutes and remain true to this Court's decision in *Foust*.

CONCLUSION

For all the foregoing reasons, Petitioners submit that a Writ of Certiorari should issue.

Respectfully submitted,

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[14] See *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986) ("where possible, provisions of a statute should be read so as not to create a conflict"); *Dole v. United Steelworkers of America*, 494 U.S. 26, 35 (1990) ("in expounding a statute, we are not guided by a single sentence or member of a sentence, but look to the provision of the whole law and to its object and policy"); *Achilli v. United States*, 353 U.S. 373, 379 (1957) ("[o]ur duty is to give coherence to what Congress has done within the bounds imposed by a fair reading of legislation").

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 93-15641, 93-16176, 93-15640

D.C. No. CV-89-4206-VRW

DOUGLAS MURRAY,
Plaintiff-Appellee-Cross-Appellant,

v.

LABORERS UNION LOCAL NO. 324; JESSE THOMAS; JESSE DURRAN, JR.; JESSE DURRAN, SR.; CHARLES J. EVANS; BOB DAVIS,
Defendants-Appellants-Cross-Appellees.

Appeals from the United States District Court
for the Northern District of California
Vaughn R. Walker, District Judge, Presiding

Argued and Submitted
February 17, 1995—San Francisco, California

Filed May 31, 1995

Amended July 14, 1995

Before: Joseph T. Sneed and Diarmuid F. O'Scannlain, Circuit Judges, and Robert R. Merhige, Jr.,*
District Judge

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* Honorable Robert R. Merhige, Jr., District Judge for the District of Virginia, sitting by designation.

ORDER

The opinion filed May 31, 1995, slip op. 5929, is amended as follows. Insert a new paragraph in section II.A., slip op. at 5942, ¶ 2, line 16, immediately following "(9th Cir. 1994)," and add the following:

> Unlike the situation in *United States v. Tabacca,* 924 F.2d 906 (9th Cir. 1991), the jury in this case had already experienced a significant delay at the outset of deliberations, with the possibility of further delays, when Judge Walker decided to excuse Juror Giancoli. Moreover, the issues of fact and law involved in this case appear to be considerably more complicated than those in *Tabacca,* increasing the risk that further disruption of the deliberation process would dull the jurors' memories and concentration.

The sentence beginning "District court judges must have ample discretion" (slip op. at 5942, ¶ 2, line 16) should follow immediately afterwards.

With the opinion so amended, the panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

Cross-Appellees' application for attorney's fees on appeal is denied.

OPINION

SNEED, Circuit Judge:

Appellants, a labor union, four of its officers, and one of its members, appeal from the judgment of the district court, entered after a jury verdict, holding them liable for violating Appellee Douglas Murray's rights under the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA). Murray cross-appeals, claiming that the district court erred by granting directed verdicts in favor of the Appellants on several claims and by refusing to vacate an unfavorable arbitration award.[1] We affirm.

I.

FACTS AND PROCEEDINGS BELOW

Appellant Laborers Union Local No. 324 (the Union) represents construction workers. Appellants Jesse Thomas, Jesse Durrin, Jr., Charles Evans, and Bob Davis are officers of the Union, and Appellant Jesse Durrin, Sr. is a now-retired member of the Union. Appellee and Cross-Appellant Murray is a member of the Union and a longtime dissident. Murray brought suit following a series of clashes with Union officers.

A. *Job Referral*

The first dispute involved a job referral. Ordinarily, Union members are dispatched to jobs as their names come up on the "plug" board in the hiring hall. As jobs are given to those listed at the top of the board, those beneath them move up and are next in line to receive

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[1] Murray brought two suits in district court, which were consolidated: his suit against Appellants and his suit to vacate the arbitration award. These disputes reached this court in the form of three appeals: Appellants' appeal from jury verdicts against them (93-15641), Murray's cross-appeal from adverse directed verdicts (93-16176), and Murray's appeal of the arbitration award (93-16540).

positions. Under certain circumstances, however, employers are allowed to request a Union member by name in a referral letter, in which case the member is dispatched regardless of the position of his name on the plug board.

In December 1988, an employer, National Energy Constructors (NEC), issued a referral letter for Murray and several others. At the time, Murray was attending classes at a training center, of which the Union was aware. Nonetheless, the Union did not attempt in any way to contact Murray. Jesse Durran, Jr., who saw Murray at the training center during December, not only was rude to Murray but did not tell him about the letter.

By the time Murray learned about the referral letter, the job with NEC was apparently no longer available. Murray filed a hiring hall grievance against the Union for not contacting him. The permanent hiring hall arbitrator, Gerald McKay, in due course ruled that the Union was not contractually obligated to tell Murray about the letter.

B. *Collection of Arbitration Costs from Murray's Dues*

When NEC refused to issue a second referral letter, Murray attempted to file a grievance against NEC for discrimination. Instead of following the procedure for a grievance against an employer, however, Murray filed another hiring hall grievance. On July 5, 1989, arbitrator McKay ruled that Murray's complaint could not be redressed through the hiring hall grievance process because his dispute was with NEC, not the Union. He ordered Murray to pay the costs of arbitration for having filed a frivolous hiring hall grievance.

In mid-January 1990, the dispute between Murray and the Union moved to another level when Murray prepaid his union dues in order to maintain his eligibility to run for office in the upcoming election. In February, the Union sent Murray the bill for its arbitration costs, totaling $802, which Murray contested. In March, the Union

informed Murray by letter that it had applied Murray's prepaid dues towards the arbitration costs and would continue to apply Murray's dues until the amount was paid off. Murray paid the full assessment under protest in order to maintain his eligibility to run for office.

C. *Distribution of Literature*

Murray, in an effort to reach the rank and file of Union members, edited and published several editions of a newsletter entitled "Pick and Shovel," which tended to be critical of the Union and its leadership. He distributed it, along with other labor literature, in the Union's hiring halls in various towns over the course of a year. In June 1989, shortly before arbitrator McKay's July 5, 1989 ruling, Murray was setting up to distribute literature in the hiring hall in Martinez, California, when Charles Evans approached him and told him not to hand out literature. Murray refused to leave, and Evans called the police. When the police arrived, they asked whether there was a union rule against distributing literature, to which Evans replied that there was not. The police left without taking any action against Murray.

At the June meeting, the Union membership voted in favor of a rule barring solicitation and distribution of literature in hiring halls during dispatch hours. Signs announcing the "No Solicitation, No Distribution" rule were subsequently posted in the hiring halls.

D. *The October 24, 1989 Meeting*

A regular Union meeting was held on October 24, 1989, at which, as part of the routine agenda, the minutes of the prior meeting were read. During this period, Murray contested the accuracy of the minutes. The minutes were nonetheless approved. The not-easily repressed Murray attempted to speak again during an unrelated agenda topic. The Union president, Jesse Thomas, ruled Murray out of order and demanded repeatedly that he "shut up

and sit down." Union officials, Evans and Davis, joined in the demand. When Murray refused to do so, Thomas ordered Murray to leave. Murray refused. Thomas told the sergeant-at-arms, John Alford, to escort Murray out. Alford hesitated, and Thomas asked the membership generally to help Alford remove Murray. Durran, Jr. approached and tried to pick up Murray's briefcase, but Murray prevented him, and a scuffle ensued. Jesse Durran, Sr. entered the fray and grabbed and pulled Murray's hair. Order was eventually restored when other Union members broke up the fight. Murray remained at the meeting.

Murray did not rest; he filed suit in federal court on November 27, 1989. His first amended complaint alleged various violations of his rights under the LMRDA, breach of the duty of fair representation, assault and battery, and conversion.

A jury trial began on February 16, 1993. Following the presentation of Murray's case, Appellants moved for judgment as a matter of law under Rule 50(a) of the Federal Rules of Civil Procedure. The court rendered judgments in favor of Appellants on the following causes of action: (1) the duty of fair representation claim; (2) the assault and battery claims against the Union, Thomas, Evans, and Davis; (3) the LMRDA claim; and (4) the conversion claim both arising from the Union's collection of arbitration costs from Murray; and (5) the LMRDA claim for infringement of the right to participate in and vote at Union meetings. The remaining claims were submitted to the jury.

The jury found that the Union and three of its officers, Evans, Thomas, and Durran, Jr., had violated Murray's right of free speech under the LMRDA.[2] The jury awarded Murray $100 in compensatory damages, plus

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[2] The jury found that Jesse Durran, Sr. and Bob Davis were not liable for free speech violations.

punitive damages: $50,000 against the Union, $10,000 against Thomas, $10,000 against Durran, Jr., and $7,500 against Evans. The jury further found that Jesse Durran, Sr. had committed assault and battery, and awarded Murray $100 in compensatory damages and $1,000 in punitive damages against him.[3]

The court denied the Union's post-trial motions for judgment as a matter of law and for a new trial. The court granted Murray's motion for attorney's fees and costs and awarded him $28,298.20. In a companion case, the court denied both Murray's motion to vacate the arbitration award and his motion for injunctive relief against the Union.

The Union timely appeals, and Murray timely cross-appeals. This court has jurisdiction under 28 U.S.C. § 1271.

II.

DISCUSSION

A. *Right to a Unanimous Verdict*

The trial lasted three and a half days. Judge Walker then gave the jury their instructions, and they began deliberating at about 12:30 p.m. on a Monday. The next day, events unfolded that presented to Judge Walker a very difficult situation. The jury on that day deliberated only until about 11:00 a.m., because one juror had to leave for a job interview. At that point, Juror Giancoli told the judge that he would have to leave early the following day, Wednesday, to attend a board meeting. The court quite properly expressed concern about the prospect of the jury taking half the day off two days in a row.

On Wednesday, the jury resumed deliberations at 8:00 a.m. The judge received three notes from the jury that

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[3] The jury found in favor of Jesse Durran, Jr. on the assault and battery claim against him.

morning.[4] The first note, unsigned, stated: "1) JURY CANNOT REACH UNANIMOUS -VERDICT. 2) JURY CANNOT REACH UNANIMOUS DETERMINATION AS TO SCHEDULE TO ACCOMMODATE ALL." A schedule of juror conflicts was attached. At 9:00, a note signed by Juror Giancoli was received. It read, "JURY IS HOPELESSLY DIVIDED."[5] Fifteen minutes later, another note was sent out. It read, "We the undersigned believe the jury has come so close to a final verdict that we would like to continue deliberating." The note was signed by seven jurors—all but Juror Giancoli. Obviously the signals being sent by the jury were mixed.

Judge Walker thereupon excused Juror Giancoli from service in order to allow the remaining jurors to continue deliberations that afternoon.[6] After Juror Giancoli was excused, the jury deliberated for another half an hour before reaching their verdict. It was learned after trial that Juror Giancoli was the holdout in favor of a defense verdict.

Appellants claim that their right to a unanimous verdict was violated, and that they were entitled to a new trial. The Seventh Amendment requires jury verdicts in federal civil cases to be unanimous. *Johnson v. Louisiana,* 406 U.S. 356, 369-70 & n.5 (1972) (Powell, J., concurring); *Andres v. United States,* 333 U.S. 740, 748 & n.13 (1948); *American Publishing Co. v. Fisher,* 166 U.S. 464, 467-68 (1897); *see also* Fed. R. Civ. P. 48 ("Unless the parties otherwise stipulate, . . . the verdict shall be unanimous . . . ."). While Rule 47(c) of the Federal Rules of Civil Procedure allows a judge to excuse

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[4] *See* Appellants' E.R. (hereinafter "E.R.") at 200-03.

[5] Following that statement were two phrases that were crossed out but still legible: "PEOPLE ON EITHER SIDE" and "At least one person on each side[.]"

[6] *See* E.R. at 205-06.

a juror from service during deliberation for good cause, "[i]t is not grounds for the dismissal of a juror that the juror refuses to join with fellow jurors in reaching a unanimous verdict." Fed. R. Civ. P. 47(c), advisory committee note (1991 amendment); *see also United States v. Hernandez*, 862 F.2d 17 (2d Cir. 1988) ("That a juror may not be removed because he or she disagrees with the other jurors as to the merits of a case requires no citation."), *cert. denied*, 489 U.S. 1032 (1989).

This type of case readily invites an appellate court to second-guess a trial court. This is a temptation we must resist while protecting the right of all parties to the judgment of the jury that was selected to hear the case. As already indicated, this right is a qualified one. Jurors are people whose needs and circumstances sometimes must be ascendent.

In support of their claim, Appellants rely mainly on *Hernandez*. In that case, the Second Circuit reversed the defendants' convictions because the trial court judge had improperly removed the lone holdout for acquittal from the jury. During deliberations, the other jurors sent several notes to the judge. At first, the notes complained of the juror's disruptiveness and lack of "rational common sense." *Id.* at 20. The judge, after being informed that the juror might have mental problems, considered removing him, but instead decided "to wait and [see] what I am going to do if there is a hung jury. I won't cross the bridge now." *Id.* at 21. Later, the notes from the jury indicated that the eleven other jurors were "making some progress" with the holdout juror. *Id.* After another day of deliberations, when it became clear that the juror would not "change his mind," the judge excused him. *Id.* at 21-22. After half an hour more of deliberations, the jury returned guilty verdicts against all the defendants. *Id.* at 22. The trial judge had waited too long before removing the disturbed juror.

The Second Circuit reasoned that it could not "be confident that [the juror's] disagreement with his colleagues was not the cause of his removal." *Id.* at 23. Even if removal of the juror for mental incompetence was justified, it should have been done as soon as that incompetence was evident. Instead, the judge waited two days to see whether the jury would deadlock. "The record thus seems to reflect that the cause of the removal was as much to avoid a mistrial because of a hung jury as to excuse an incompetent juror." *Id.* The combination of the uncertainty of the record regarding the cause of removal, the delay, and the judge's prejudicial remarks [7] to the jury required reversing the convictions. *Id.*

This case is different. In this case, the notes from the jury are ambiguous. They do not create a compelling inference that the jury was split between Juror Giancoli and the remaining jurors. Judge Walker moved promptly. Neither his remarks nor his actions indicate in any way that he chose to remove Juror Giancoli because he perceived him to be the lone obstacle to a unanimous decision.

Furthermore, we find that, under the circumstances of this case, the removal of Giancoli due to his scheduling conflict meets the "good cause" standard. Although "[s]ickness, family emergency or juror misconduct that might occasion a mistrial are examples of appropriate grounds" for excusing a juror, Fed. R. Civ. P. 47(c) advisory committee's note (1991 amendment), the judge's

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[7] The Second Circuit noted that

> whatever small possibility existed of continuing with the remaining eleven jurors . . . was eliminated by the district judge's remarks to the jury . . . . Those remarks praised the eleven lavishly for their efforts to persuade [the holdout juror] to vote to convict. . . . [T]he effect was to eliminate any possibility that the remaining eleven jurors could resume deliberations with an open mind.

Id. at 24.

discretion is not limited to those scenarios. " '[J]ust cause' . . . embraces all kinds of problems—temporary as well as those of long duration—that may befall a juror during jury deliberations." *United States v. Reese,* 33 F.3d 166, 173 (2d Cir. 1994), *cert. denied,* 115 S. Ct. 756 (1995). Thus, for example, the decision to excuse a juror who had to attend a week-long business trip has been approved. *Reese,* 33 F.3d 166. This court has even upheld the decision to excuse a juror who had a planned vacation. *United States v. McFarland,* 34 F.3d 1508 (9th Cir. 1994).

Unlike the situation in *United States v. Tabacca,* 924 F.2d 906 (9th Cir. 1991), the jury in this case had already experienced a significant delay at the outset of deliberations, with the possibility of further delays, when Judge Walker decided to excuse Juror Giancoli. Moreover, the issues of fact and law involved in this case appear to be considerably more complicated than those in *Tabacca,* increasing the risk that further disruption of the deliberation process would dull the jurors' memories and concentration. District court judges must have ample discretion to control their dockets. The removal of Juror Giancoli for good cause early in the day in order to allow the rest of the jury to continue deliberating was entirely proper.

B. *Infringement of Murray's Free Speech Rights*

The Union also argues that the jury verdicts finding violations of Murray's speech rights are unsupported by the evidence and contrary to law. Jury verdicts are reviewed to determine whether they are supported by "substantial evidence," that is, such relevant evidence as reasonable minds might accept as adequate to support a conclusion. *Davis v. Mason County,* 927 F.2d 1473, 1486 (9th Cir.), *cert. denied,* 502 U.S. 899 (1991). The credibility of witnesses and the weight of the evidence are issues for the jury that are generally not sub-

ject to appellate review. *Oviatt v. Pearce*, 954 F.2d 1470, 1473 (9th Cir. 1992).

In particular, the Union argues that neither its failure to contact Murray about the NEC referral letter nor the "No Solicitation, No Distribution" rule can, as a matter of law, form the basis of an LMRDA violation. Perhaps so. Nonetheless, there remains substantial evidence in the record to support the jury's verdicts. Specifically, evidence of the attempt to confiscate Murray's newsletters, the events of the October 24, 1989 meeting, and the Union's application of Murray's prepaid dues to the arbitration award [8] all suffice to establish a "general scheme to suppress dissent within the union" sufficient to prove a violation of §§ 101(a)(2) and 102 of the LMRDA.[9] *Phelan v. Local 305 of the United Ass'n of Journeymen*, 973 F.2d 1050, 1063 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1415 (1993). Clearly, the jury believed Murray's version of events.

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[8] The Union appears to argue that the jury should not have been allowed to consider evidence concerning its actions in applying Murray's prepaid dues to the arbitration award because Murray failed to exhaust his administrative remedies. However, in cases brought under the LMRDA, whether to require exhaustion of internal union procedures is a matter left to the district court's discretion. *Ornellas v. Oakley*, 618 F.2d 1351, 1354 (9th Cir. 1980). There is no indication that Judge Walker abused his discretion in not requiring exhaustion here, particularly given that the Union did not raise the exhaustion issue until the eve of trial.

[9] The statute provides:

> Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting . . . .

LMRDA, § 101(a)(2), 29 U.S.C. § 411(a)(2). Section 102 creates a federal cause of action for infringement of the rights provided in § 101. LMRDA, § 102, 29 U.S.C. § 412.

C. *Punitive Damages*

The Union contends that the punitive damages awards against it and its officers are constitutionally excessive. Appellants point to the fact that the punitive damages totaled nearly 800 times the compensatory damages.[10]

Punitive damages awards must comply with the standard established by this circuit in *Morgan v. Woessner*, 997 F.2d 1244 (9th Cir. 1993), *cert. dismissed*, 114 S. Ct. 671 (1994).[11] *Morgan* establishes a three-part test to determine whether a punitive damages award violates due process.[12]

First, this court must ascertain whether the trial court properly instructed the jury on the purpose of punitive damages, "so that the jury understands that punitive damages are not to compensate the plaintiff, but to punish the defendant and to deter the defendant and others from such conduct in the future." *Id.* at 1256. The record clearly shows that Judge Walker complied with this mandate in instructing the jury.[13]

Second, the trial judge must have given its reasons for upholding the punitive damages award on the record and, in doing so, make some comparison between the amount of punitive damages actually assessed and an alternative figure derived from the facts of the case at hand, as well as from awards in similar cases and the experience of the court. *Id.* at 1257. In this case, Judge Walker ex-

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[10] For the LMRDA violations, Murray was awarded $100 in compensatory damages and $77,500 in punitive damages against the Union and four of its officers.

[11] This court developed the *Morgan* standard to comply with the Supreme Court's decision in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

[12] The test is equally applicable to punitive damages imposed by state or federal courts. *Morgan*, 997 at 1255.

[13] *See* Reporter's Transcript ("R.T.") at 4-735.

plained that the punitive damages, albeit much higher than the compensatory damages, were justified:

> What Mr. Murray was deprived of was his free speech rights. That's the sort of thing you can't really put a price tag on. And the jury was, as I understood it, saying that there is no price tag that can be put on that sort of thing, but there's certainly a reason to discourage the union from attempting to stifle the free speech rights of its members.[14]

We cannot fault his reasons for upholding the punitive damages awards against Appellants.

Third, this court must review the punitive damages award for excessiveness. *Id.* at 1257-58. "A circuit court should determine whether a punitive damages award exceeds the amount necessary to accomplish the goals of punishment and deterrence in deciding whether it is grossly excessive." *Id.* at 1258 (applying the standard set by *Haslip*, 499 U.S. at 17). Given the seriousness of the infringement on Murray's freedom of speech, we find that the punitive damages awards in this case are not grossly excessive.

D. *Attorney's Fees*

The Union argues that the district court's award of attorney's fees to Murray was improper because the litigation did not provide a "valuable service"[15] to the union membership. We permit successful plaintiffs to recover attorney's fees under the LMRDA where (1) the opposing party acted in bad faith, or (2) the litigation performed a valuable service for the union and its mem-

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[14] E.R. at 491.

[15] In its brief, the Union used the term "substantial benefit"; however, the terms "valuable service" and "substantial benefit" are synonymous. *Southerland v. International Longshoremen's & Warehousemen's Union*, 845 F.2d 796, 799 (9th Cir. 1987).

bers. *Ross v. International Bhd. of Elec. Workers,* 544 F.2d 1022, 1025 (9th Cir. 1976). A finding of valuable service is reviewed under the clearly erroneous standard. *Southerland,* 845 F.2d at 799.

The district court's award of attorney's fees to Murray was not clearly erroneous. Judge Walker found support based on both bad faith and valuable service.[16] The vindication of Murray's speech rights performed a valuable service for the union membership. While Murray may well have been a nuisance to the Union leadership, they suppressed him at their peril. The common good is often advanced prudently by visionary nuisances speaking freely. In addition, the evidence on the record and the jury's award of punitive damages support a finding that the Union and its officers acted in bad faith.

E. *Judgments As a Matter of Law*

Nuisances are not always right, however. In his cross-appeal, Murray contends that the district court erred by entering judgment as a matter of law in favor of Appellants on four of his claims. A directed verdict is reviewed *de novo. Zamalloa v. Hart,* 31 F.3d 911, 913 (9th Cir. 1994). "[A] directed verdict is proper when the evidence permits only one reasonable conclusion as to the verdict." *McGonigle v. Combs,* 968 F.2d 810, 816 (9th Cir.), *cert. dismissed,* 113 S. Ct. 399 (1992). We now address each of these claims.

1. *Breach of the duty of fair representation claims.*

a. *Re NEC referral letter.*

The trial court properly granted Appellants' motion for a directed verdict on this issue. It is clear from the evidence that the Union did not make a regular practice of notifying Union members at the training center about

[16] R.T. (July 30, 1993) at 21.

referral letters, although the Union had done so on occasion. There is no such requirement in the collective bargaining agreement. The Union did not, therefore, have any duty to notify Murray of the referral letter. Accordingly, it did not breach its duty of fair representation by failing to do so.

b. *Re handling of the NEC grievance.*

Murray also seeks to bring a breach of the duty of fair representation claim based on the Union's alleged mishandling of his NEC grievance, which Murray mistakenly brought as a hiring hall grievance and had costs assessed against him as a result. This claim, however, is time-barred because it was not brought within six months of the arbitrator's written decision. *Galindo v. Stoody Co.*, 793 F.2d 1502, 1509 (9th Cir. 1986).[17] Murray is not entitled to application of the relation-back doctrine because the facts involving the Union's conduct during the grievance procedure were not alleged in Murray's original complaint. *Percy v. San Francisco Gen. Hosp.*, 841 F.2d 975, 979 (9th Cir. 1988). The grant of the directed verdict to Appellants on this issue was therefore proper.

2. *Unlawful discipline under the LMRDA.*

Murray next argues that the Union's actions in taking his prepaid dues and applying that money to the arbitration costs assessment—thereby forcing him to pay the entire assessment in order to maintain his good standing as a member and eligibility to run for union office—constituted "discipline" for purposes of § 101(a)(5) of the LMRDA.

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[17] Murray argues that he is entitled to equitable estoppel based on the Union's delay in billing him for the costs awarded by the arbitrator's decision. We reject this argument. The fact that the Union did not promptly send Murray the bill did not change the fact that Murray was on notice as of the arbitrator's decision on July 5, 1989 that those costs were going to be assessed against him. His delay in filing his duty of fair representation claim is therefore not excused.

As such, Murray claims, those actions violated his rights because he was not afforded the due process provided under § 101(a)(5).

First we consider whether Murray was subjected to discipline. "Discipline" under § 101(a)(5) is a retaliatory act that affects a union member's rights or status as a member of the union. *Finnegan v. Leu,* 456 U.S. 431, 437 (1982); *Lynn v. Sheet Metal Workers' Int'l Ass'n,* 804 F.2d 1472, 1478 (9th Cir. 1986), *aff'd,* 488 U.S. 347 (1989). Murray maintains that the dues were taken and applied to the arbitration award in retaliation for Murray's speech activities. As he sees it, the Union's action was discipline because, but for his intervention, it would have resulted in the loss of his membership through "nonpayment" of dues, as well as his ineligibility to run for union office, and therefore amounted to discipline.

Assuming *arguendo* that taking Murray's prepaid dues to satisfy the arbitration costs was a form of discipline, the question remains whether Murray was denied due process. Here Murray encounters difficulty. He claims he was entitled to a hearing before the Union applied his dues to the outstanding arbitration award. In support of his position, Murray cites *English v. Cowell,* 969 F.2d 465 (7th Cir. 1992), which held that a union could not, based on a member's felony conviction, terminate his union membership without a hearing. *English,* however, is easily distinguishable. There the court reasoned that expulsion from the union did not *necessarily* follow from the member's criminal conviction, although it certainly could be reason enough to expel the member. *See id.* at 471. In other words, the member was still entitled to the determination that the felony conviction warranted expulsion.

Here, by contrast, Murray had *already* received notice and a full hearing before the *assessment* of arbitration hearing). The application of Murray's dues money to the

arbitration award was only an *execution* on the judgment. There was nothing left to have a hearing about, no decision left to be made. *See id.* at 471 n.12. No additional hearing was necessary, and the Union's actions did not violate § 101(a)(5). It was Murray's obligation to replenish his dues. No hearing was necessary to fix that obligation. Thus, the district court correctly granted the Union's motion for a directed verdict on this issue.

3. *Conversion.*

Here Murray attempts to refute the basis of the above holding by arguing that the Union's taking his prepaid dues and applying them to the arbitration award amounted to conversion. This argument is meritless. By definition, conversion involves the "unauthorized assumption and exercise of the right of ownership over goods or personal chattels *belonging to another.*" *Black's Law Dictionary* 300 (5th ed. 1979) (emphasis added). The Union did not have mere lawful possession of Murray's dues, it also had lawful *title* to them. Murray had no ownership rights in his prepaid dues with which the Union could interfere. Accordingly, the district court did not err in granting the Union's motion for a directed verdict on this issue.

4. *Assault and battery.*

Murray also insists that the jury should have been allowed to decide the assault and battery claims against the Union, Thomas, Davis, and Evans. None of these defendants actually touched Murray. Murray argues that they are nonetheless vicariously liable. He relies on *Coats v. Construction & Gen. Laborers Local No. 185*, 15 Cal. App. 3d 908, 93 Cal. Rptr. 639 (1971), which held that a union could be held liable for a series of brutal assaults committed by its officers where it ratified their actions by not disciplining them.

Coats is distinguishable. In this case, ratification is lacking. Here the jury found Durran, Jr., the only officer

who actually had physical contact with Murray, not liable for assault and battery. Durran, Sr., who was found liable, was only a rank-and-file member. Although the record shows that Union officers were irritated by Murray, ruled him out of order, told him to sit down and shut up, and forced him to leave meetings on several occasions, these actions do not show that the Union's officers incited or encouraged Durran, Sr.'s assault against Murray. Nor does Murray point to any evidence in the record that shows the Union expressly or impliedly ratified Durran, Sr.'s assaultive behavior. Judge Walker correctly granted Appellants' motion for a directed verdict on these claims.

F. *Denial of Murray's Motion to Vacate the Arbitration Award*

Murray, fiercely contesting all issues on which he did not prevail, argues that the district court erred in denying his motion to vacate the McKay arbitration award, which assessed costs against him. Again, Murray's argument fails.

First, Murray's motion was untimely. It was not brought within 100 days of the arbitrator's written decision of July 5, 1989. Murray insists that the decision was not final because the actual amount of the costs was not known to him until the Union sent a bill on February 20, 1990. Contrary to Murray's suggestion, the decision *was* final. The dispute resolution process was exhausted. *Kemner v. District Council of Painting & Allied Trades No. 36*, 768 F.2d 1115, 1119 (9th Cir. 1985). This was not a case in which the arbitrator retained jurisdiction to decide the remedy, thereby implying an intent that the award not be final. *See Millmen Local 550 v. Wells Exterior Trim*, 828 F.2d 1373, 1376-77 (9th Cir. 1987). Rather, it was a purely technical matter for the Union to send its bill for costs.[18] Murray knew, as of the

[18] The arbitrator's decision specified that Murray pay for the costs of his services and of the hearing transcript. E.R. at 403.

arbitrator's decision on July 5, 1989, that costs were being assessed against him. He has no excuse for his delay in appealing the arbitrator's decision to award those costs.

Second, the motion was properly denied on the merits as well. The scope of review of labor arbitration decisions is extremely narrow and highly deferential. *Federated Dep't Stores v. United Food & Commercial Workers Union,* 901 F.2d 1494, 1496 (9th Cir. 1990). The grievance procedure under the collective bargaining agreement is viewed as part of the bargain; therefore, " '[i]t is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.' " *Id.* (quoting *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 599 (1960)).

In this case, the arbitrator interpreted the collective bargaining agreement to allow him to award costs based on his power to "adjust grievances." That interpretation is a "plausible" one, and therefore must be enforced by this court. *Id.* There is no indication that McKay dispensed his "own brand of industrial justice," that he exceeded the boundaries of the issues submitted to him, or that the award is contrary to public policy. *Id.*

The judgment of the district court is therefore AFFIRMED in all respects.

APPENDIX B

[Filed Feb. 24, 1993]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case Number: C 89-4206 VRW
C 90-1712 VRW

DOUGLAS MURRAY

v.

LABORERS UNION LOCAL 324; JESSE THOMAS, JESSE DURRAN, JR., JESSE DURRAN, SR., CHARLES EVANS and BOB DAVIS

☒ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED plaintiff shall recover jointly and severally his actual damages of $100.00 from Laborers' Union Local No. 324, Jesse Thomas, Jesse Durran, Jr., Jesse Durran, Sr., and Charles Evans and shall recover individually punitive damages of $50,000.00 from Laborers' Union Local No. 324, punitive damages of $10,000.00 from Jesse Thomas, punitive damages of $10,000.00 from Jesse Durran, Jr., punitive damages of $7,500.00 from Charles Evans and punitive damages of $1,000.00

from Jesse Durran, Sr., all with interest thereon at the rate of 3.45 per cent as provided by law and plaintiff shall also recover his costs of suit. Plaintiff shall take nothing from defendant Bob Davis.

Date February 24, 1993

RICHARD W. WIEKING
Clerk

/s/ Wynette Bailey
(By) Deputy Clerk

APPENDIX C

[Filed Feb. 24, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-89-4206-VRW
C-90-1712-VRW

DOUGLAS MURRAY,

Plaintiff,

v.

LABORERS UNION LOCAL NO. 324; JESSE THOMAS, JESSE DURRAN, JR., JESSE DURRAN, SR., CHARLES EVANS, and BOB DAVIS,

Defendants.

SPECIAL VERDICT

WE, THE JURY, FIND AS FOLLOWS ON THE QUESTIONS SUBMITTED TO US:

QUESTION NO. 1.

A. Do you find that plaintiff has proven that defendants, or any of them, have violated his free speech rights under the Labor Management Reporting and Disclosure Act? Answer "Yes" or "No" as to each of the following defendants.

Laborers Union Local No. 324	Yes
Jesse Thomas	Yes
Jesse Durran, Jr.	Yes
Jesse Durran, Sr.	No
Charles Evans	Yes
Bob Davis	No

If you have answered "Yes" as to any defendant;

B. Do you find that plaintiff was damaged as a result of the violation you have found?

Yes ✔ No ———

C. If you find plaintiff was damaged, what amount of damages do you find plaintiff sustained?

$100.00

D. Do you award punitive damages against any defendant because it or he acted with malice or reckless or wanton indifference to, or disregard of, plaintiffs' rights under the Labor Management Reporting and Disclosure Act? If your answer is "Yes" as to any defendant, write the amount of punitive damages you award against that defendant opposite their name. If your answer is "No" as to any defendant for whom you find liability, write "No" opposite their name.

Laborers Union Local No. 324	$50,000.00
Jesse Thomas	10,000.00
Jesse Durran, Jr.	10,000.00
Jesse Durran, Sr.	N/A
Charles Evans	7,500.00
Bob Davis	N/A

QUESTION NO. 2.

A. Do you find that plaintiff has proven that defendants Jesse Durran, Jr. and/or Jesse Durran, Sr. are liable to him for assault and battery? Answer "Yes" or "No" as to each of the following defendants.

Jesse Durran, Jr.	No.
Jesse Durran, Sr.	Yes.

B. If you have answered any part of this question "Yes," do you find that plaintiff was damaged as a result of the violation you have found?

Yes ✔ No ———

C. If you find plaintiff was damaged, what amount of damages do you find that plaintiff suffered:

Jesse Durran, Jr.	$ N/A
Jesse Durran, Sr.	$100.00

D. Do you award punitive damages against either defendant Jesse Durran, Jr. or Jesse Durran, Sr. because he was guilty of oppression, fraud or malice in the conduct on which you base your finding of liability? If your answer is "Yes" as to either defendant, write the amount of punitive damages you award against that defendant opposite his name. If your answer is "No" as to both defendants, please date and sign this Verdict.

Jesse Durran, Jr.	$N/A
Jesse Durran, Sr.	$1,000.00

* * *

The foregoing answers to the questions which have been asked of us are the unanimous verdict of the Jury.

Dated: February 24, 1993 /s/ Kelly Plughoff
Foreperson of the Jury

APPENDIX D

[Filed Aug. 14, 1995]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 93-15641, 93-16176, 93-16540

DC No. CV-89-4206-VRW

DOUGLAS MURRAY,
Plaintiff-Appellee-Cross-Appellant,

v.

LABORERS UNION LOCAL NO. 324; JESSE THOMAS; JESSE DURRAN, JR.; JESSE DURRAN, SR.; CHARLES J. EVANS, BOB DAVIS,
Defendants-Appellants-Cross-Appellees.

ORDER

Before: SNEED, Circuit Judge.

Appellants/Cross-Appellees' motion for recall of mandate and for stay of mandate pending the filing of petition for writ of certiorari to the United States Supreme Court is denied.

APPENDIX E

[Filed May 11, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No: C 89 4206 VRW

DOUGLAS MURRAY,
Plaintiff-Appellee
vs.

LABORERS UNION LOCAL NO. 324, JESSE THOMAS, JESSE DURRAN, JR., JESSE DURRAN, SR., and CHARLES EVANS,
Defendants-Appellants

ORDER OF STAY PENDING APPEAL AND APPROVING SUPERSEDEAS BOND

This matter came on ex parte upon the Application of attorneys for Defendants for a stay of enforcement pending the outcome of an appeal pursuant to Rule 62, FRCP. Having read and considered the application and the accompanying declaration and attached copy of supersedeas bond, and good cause appearing, it is ordered as follows:

The supersedeas bond is hereby approved, and no execution shall issue upon the judgment entered in this case, nor shall proceedings be taken for its enforcement pending the outcome of the appeal taken in this matter.
May ——, 1993

/s/ Vaughn R. Walker
HONORABLE VAUGHN R. WALKER
United States District Judge

APPENDIX F

[Filed Apr. 29, 1993]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-15641

DC# CV-89-04206-VRW
Northern California
(San Francisco)

DOUGLAS MURRAY,
Plaintiff-Appellee,

vs.

LABORERS UNION LOCAL NO. 324, *et al.*,
Defendants-Appellants.

ORDER

Before: KOZINSKI and RYMER, Circuit Judges

The emergency motion for a stay of the judgment pending appeal is denied.

The April 12, 1993 time schedule order remains in effect.

APPENDIX G

[Filed Mar. 8, 1993]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No: C 89-4209 VRW
C 90-1712 VRW

DOUGLAS MURRAY,

Plaintiff,

VS.

LABORERS UNION LOCAL NO. 324, JESSE THOMAS, JESSE DURRAN, JR., JESSE DURRAN, SR., CHARLES EVANS, and BOB DAVIS,

Defendants.

ORDER GRANTING STAY OF EXECUTION ON JUDGMENT PENDING OUTCOME OF POST-TRIAL MOTIONS

This matter having come before the Court by way of Defendants Motion for Stay of Execution of Judgment Pending Disposition of Motion for New Trial and Motion for Judgment as a Matter of Law, the Court having reviewed the Declaration of Sandra Rae Benson filed concurrently therewith, and the Court being advised of the premises;

THE COURT HEREBY FINDS, that in the interests of fairness and justice, a stay of execution of, or any proceedings to enforce, the Judgment in this case should be entered pending the disposition of Defendants' post-trial Motions. Accordingly;

IT IS HEREBY ORDERED, pursuant to the discretion vested in this Court by Fed.R.Civ.Pro. 62(b) that the Judgment in this case shall be stayed, and no proceedings to enforce the Judgment shall be entertained, pending the disposition by this Court of Defendants' Motion for New Trial, and Motion for Judgment as a Matter of Law.

DATED: March 8, 1993

/s/ Vaughn R. Walker
VAUGHN R. WALKER
United States District Judge

APPENDIX H

STATUTORY PROVISIONS

29 U.S.C. §§ 158, 159, 411, 412, 529

§ 158.

* * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

§ 159. Representatives and elections—Exclusive representatives; employees' adjustment of grievances directly with employer

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or

other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

§ 411. Bill of rights; constitution and bylaws of labor organizations

(a)(1) Equal rights

Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) Freedom of speech and assembly

Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,* That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization of an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

(3) Dues, Initiation fees, and assessments

Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on September 14, 1959 shall not be increased, and no general or special assessment shall be levied upon such members, except—

(A) in the case of a local labor organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or

(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: *Provided,* That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization.

(4) Protection of right to sue

No labor organization shall limit the right of any member thereof to institute an action in any court, or

in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided,* That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further,* That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

(5) Safeguards against improper disciplinary action

No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

(b) Invalidity of constitution and bylaws

Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.

(Pub.L. 86-257, Title I, § 101, Sept. 14, 1959, 73 Stat. 522.)

§ 412. Civil action for infringement of rights; jurisdiction

Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

(Pub.L. 86-257, Title I, § 102, Sept. 14, 1959, 73 Stat. 523.)

§ 529. Prohibition on certain discipline by labor organization

It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this chapter. The provisions of section 412 of this title shall be applicable in the enforcement of this section.

(Pub.L. 86-257, Title VI, § 609, Sept. 14, 1959, 73 Stat. 541.)

APPENDIX I

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case Number: C 89-4206 VRW
C 90-1712 VRW

DOUGLAS MURRAY

v.

LOCAL 324, *et al.*

NOTE FROM THE JURY

THE JURY REQUESTS THE FOLLOWING:

Date: 2/24/93

1) Jury cannot reach unanimous verdict.

2) Jury cannot reach unanimous determination as to schedule to accommodate all. Please see attached schedule/restrictions.

Thank You.

/s/ Kelly Plughoff
Jury Foreperson

C 89-4206 VRW
C 90-1712 VRW

Jury Schedule/Restrictions
through Friday 2/26/93

Betty Bowers—No restrictions

Paula Caroe—Retires on Friday—Would prefer to attend celebration activities Thursday and Friday

Rolland DeWolk—Must leave at 4:00 today. No restrictions Thursday and Friday

Robert Maagdenberg—Must leave at 4:30 today. No restrictions Thursday and Friday

Doug Giancoli—Must leave at 11:15 today. No restrictions Thursday and Friday

Richard Montoya—No restrictions

Russ Frost— "

Kelly Plughoff— "

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case Number: C 89-4206 VRW
C 90-1712 VRW

DOUGLAS MURRAY

v.

LOCAL 324, *et al.*

NOTE FROM THE JURY

THE JURY REQUESTS THE FOLLOWING:

Date: 2-24-93

Time: 9:00 a.m.

Jury is hopelessly divided.

/s/ D Giancoli
Jury Foreperson

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case Numb[illegible]: C 89-4206 VRW
C 90-1712 VRW

DOUGLAS MURRAY

v.

LOCAL 324, *et al.*

NOTE FROM THE JURY

THE JURY REQUESTS THE FOLLOWING:

Date: FEB 24, 1993

Time: 9:15 AM

We the undersigned believe the jury has come so close to a final verdict, that we would like to continue deliberating.

Sincerely,

/s/ Paula Caroe

/s/ Betty Bowers

/s/ Roland DeWolk

/s/ Kelly Plughoff

/s/ Richard Montoya

/s/ Robert Maagdenberg
Jury Foreperson

/s/ Russ Frost

APPENDIX J

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VAUGHN R. WALKER, JUDGE

No. C 89-4206 VRW
No. C 90-1712 VRW

DOUGLAS MURRAY,

Plaintiff,

VS.

LABORERS UNION LOCAL NO. 324; JESSE THOMAS; JESSE DURAN, JR.; JESSE DURAN, SR.; CHARLES EVANS; and BOB DAVIS,

Defendants.

---

[2] Wednesday, February 24, 1993

(Open Court, jury not present:)

THE CLERK: Calling Civil 89-4206 and Civil 90-1720, Douglas Murray versus Local 324.

Counsel, your appearances for the record, please.

MR. KATZENBACH: Good Morning, Your Honor. Christopher W. Katzenbach appearing for the plaintiff.

THE COURT: Mr. Katzenbach.

MS. BENSON: Good Morning, Your Honor. Sandra Benson for the defendants.

THE COURT: Miss Benson.

The clerk, I believe, has given you both copies of the messages that we have received from the jury.

(Pause in Proceedings)

THE COURT:Looking at these, it appears that the juror who has the restriction with respect to his ability to participate in the deliberations is Mr. Giancoli, who must leave at 11:15 today. All of the others have no restriction on further participation in deliberations today.

And those jurors in the note at 9:15 state that they believe that they are close to a verdict and that they should continue to deliberate.

In light of Mr. Giancoli's commitment, my belief is that he should be excused and the remaining seven jurors [3] continue to deliberate for the balance of the day.

MR. KATZENBACH: Your Honor, I think that's appropriate.

THE COURT: Miss Benson.

MS. BENSON: Well, Your Honor, I'm. . . I'm a little concerned, because we don't know exactly what the division is, obviously.

THE COURT: No, and that—obviously, we can't—

MS. BENSON: We can't. I know that.

THE COURT: We can't determine—

MS. BENSON: That's right.

THE COURT: —what our position is.

But we face a practical problem: One Juror, who's got a commitment today, and the others who would like to continue deliberating and who are available to do so.

MS. BENSON: I realize that.

I'm just concerned, because I'm not sure if there really is any rule, certainly not one that I'm aware of, that. . .

I think at this point we may be facing a mistrial, which none of us really want. I think we realize that.

THE COURT: What would be the mistrial basis?

MS. BENSON: In the event we have a hung jury, which, if all eight of them stay on the jury, it looks like there may be a possibility that we're not going to get a unanimous verdict.

[4] I'm a little concerned about one juror's simply being removed from the jury panel because he can't deliberate today.

THE COURT: Well, it wouldn't be any different from a situation that we would confront if Mr. Giancoli were to become ill, for example, or encounter some misfortune which would preclude him from participating.

MS. BENSON: Sure. I understand that's a physical problem.

I think at this point—and I'm certainly speculating, but I'm getting the impression that we may have a division of seven-one at this point—

THE COURT: Maybe—

MS. BENSON: —And—

THE COURT: But maybe not.

MS. BENSON: You're absolutely correct. This is purely speculation.

There is nothing that is physically preventing Mr. Giancoli from continuing with the deliberations other than his own business schedule of having a board meeting, apparently.

I just am reluctant to say, let's let him go, because I—I mean, I just—I think we may be affecting the outcome of this verdict in a way which whomever loses the case—and I don't know who that person is going to be—would

be prejudiced by the fact that where the person might have ended up with a hung jury will end up with an adverse verdict simply because one [5] juror was allowed to leave because of his own business schedule as opposed to any physical or inability to continue.

I think you understand what I'm saying, as—it's just a—I'm having sort of a gut feeling here that this may not be what we want to do.

THE COURT: Well, I'd much prefer to have the jury continue as a whole, but the reason we have eight that we impanel is to deal with a situation such as this, or the myriad other circumstances which may arise in the course of the trial.

And I think we simply have to face the fact that we've got a juror who has a commitment, which is apparently a long-standing one. And, bear in mind, the circumstance is not in any way attributable to Mr. Giancoli. I originally told the panel that I thought we'd get the evidence in by Thursday of last week. We didn't do so, and so the case carried over until this week, and it was not unreasonable for him to go about his life and to make commitments to be places, and so he cannot be blamed in any way for this circumstance.

MS. BENSON: I understand that.

May I make one suggestion, Your Honor? I know yesterday you mentioned to them that if there were instructions they felt they needed further clarification on, that you would be happy to do so.

Perhaps—I mean, Mr. Giancoli still has an hour and 15 minutes before he has to leave. Perhaps when you bring them [6] in, you could remind them, "is there—is there a certain area that you would like the court to give some further instructions or clarification," just to see if—if there is an area where maybe you can assist them in breaking whatever deadlock there is.

And then if, come 11:30, this hasn't helped, then I can see that we're facing this problem. But maybe just reminding them that you can give them some clarification

if there's something that's really sticking, that maybe that might help them a little bit.

THE COURT: Well, all right. After all, I made that offer yesterday and we haven't had any—

MS. BENSON: They haven't taken us up on it.

THE COURT: No, they haven't taken us up on it.

And you recall Mr. Frost said on the way out or asked on the way out whether we could have portions of the transcript read back, and I gave him the usual response, which is, "yes, with difficulty, we could." And we haven't had a request for any readback, either, so—

MS. BENSON: Yes, I realize that. And they obviously know what the sticking point is and we don't—

THE COURT: That's right.

MS. BENSON: —And so—

THE COURT: So I don't think—and this is an intelligent jury, and they obviously know how to communicate.

[7] So I think we should simply bring them in and tell them that . . . I'm prepared to excuse Mr. Giancoli in light of his commitments and in light of the ability of the others to continue their deliberations, and suggest that they do so. All right.

(Open Court, jury present:)

THE COURT: All right. Good morning, ladies and gentlemen.

THE JURORS: Good morning.

THE COURT: Thank you for your notes.

I have had an opportunity now to discuss with the lawyers at some length about basically what we confront as a scheduling problem.

Mr. Giancoli has a meeting today which he needs to attend. And after thoroughly considering the matter and discussing it with the lawyers, I'm prepared, Mr. Giancoli, to excuse you from further participation in the—in the jury.

The reason we have eight people on a civil jury when we only need six for a verdict is to deal with situations such as this, or the myriad other situations which arise sometimes in the course of a trial, when one or more members of the panel are unable to go the distance, and you're in that situation.

* * * *

APPENDIX K

A MATTER IN ARBITRATION

IN A MATTER BETWEEN:

DOUGLAS MURRAY,

(Grievant)

and

LABORERS' UNION, LOCAL 324,

(Union)

Grievance: Hiring Hall Claim of Douglas Murray

Hearing: April 6, 1989

Award: May 19, 1989

DECISION AND AWARD
GERALD R. McKAY, ARBITRATOR

STATEMENT OF PROCEDURE

This matter arises out of the application and interpretation of a collective bargaining Agreement which provides for an open hiring hall.[1] The grievant has claimed the Union violated his rights as provided for in the collective bargaining Agreement with respect to the hiring hall provisions. This arbitrator was selected by the provisions of the collective bargaining Agreement to sit as the permanent hiring hall arbitrator. A hearing on

---

[1] Joint Exhibit #1.

the complaint of Mr. Murray was held on April 6, 1989. During the course of the proceedings, the parties had an opportunity to present evidence and to cross-examine the witnesses. At the conclusion of the hearing, the arbitrator issued a decision from the bench. This writing is a confirmation of the decision which is set forth in the transcript of the proceedings.

ISSUE

Did the Union violate the provisions of the hiring hall Agreement as contained in the Laborers' Master Agreement in the manner in which it treated Mr. Murray? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

Section 3—Employment and Discharge

B. Employment

(6)(e) No person shall be dispatched pursuant to the provisions of subsections 6(a), 6(b) or 6(c) of this Section unless the Individual employer's request is in writing, dated, is signed by an appropriate management representative, specifies whether the person is a rehire, and names the job for which rehire is requested.

Second, persons who, within five (5) years immediately preceding the job order, performed work covered under this Agreement in the geographical area covered by this Agreement in the order in which they registered.

Third, persons who are registered in the order in which they registered by qualification.

(7) Available or employment shall meant: All persons eligible for referral shall be present at the hiring hall or present at their residence phone if they live at a location specified in subsection (2) of this subsection

3B during dispatching hours, unless excused for the following reasons:

(a) When a death occurs in the immediate family, from the date of death and not exceeding one week after the date of burial; however, they shall produce bona fide proof of such death.

(b) Persons on jury duty, providing they produce bona fide proof that they are serving on a jury.

(c) Persons temporarily serving in the U.S. Military Reserve, providing they show a bona fide proof of such service.

(d) Attendance of Workers' Compensation Hearing or any Administrative or court appearance.

BACKGROUND

The grievant is a member of Local 324 and is registered in the hiring hall operated by the Union. According to the grievant, on about January 3, 1989, he learned that an employer by the name of N.E.C. had requested his services as a laborer on a job in which they were acting as the contractor. It is the contention of Mr. Murray that no one from the Union made any effort to inform him of the employer's request for the N.E.C. job. As a result of the Union's failure, Mr. Murray contends, he lost wages and benefits which he otherwise would have earned. It was the position of the Union that it never obtained a letter from N.E.C. requesting that the grievant be dispatched to a job. Furthermore, the Union asserted, the grievant was not available for work within the meaning of that language of the Contract because, at the time the alleged request was made, the grievant was in a Union-sponsored training program.

A letter dated December 7, 1988 and signed by Ronald (Buz) Phillips was introduced by Mr. Murray as the letter requesting his services. This letter states, "Would

you please clear Douglas Murray, SS#136-84-8903, for the Co.-Generation Plant at 2100 Wilbur Avenue, Antioch, California, for National Energy Constructors." [2] Mr. Phillips testified that the way letters of this type are generated is that the employee comes to the employer seeking work. If the employer decides that the employee might be somebody who could perform good services, it issues a letter and gives it to the employee. The employee then takes the letter to the Local Union and receives a dispatch. According to Mr. Phillips, it has been his experience that the Union will not issue a dispatch unless the employee takes the letter to the Local Union. After the Local Union has the letter, the employer will call the Union and confirm that the letter is genuine and that the Union should dispatch the employee. All of the employees to whom letters such as the one written for Mr. Murray come to the employer and pick up the letter and deliver it. Mr. Phillips testified that he has never mailed any letter to the Union and that he did not mail this letter to the Union.

Mr. Murray did not go to Mr. Phillips or anyone else at N.E.C. to be interviewed for the position which Mr. Murray was seeking. According to Mr. Phillips, Mr. Murray was interviewed by Mr. Wohadlo, who is president of GWF. This company, Mr. Phillips testified, was formed in order to create N.E.C. In this respect, N.E.C. is a division or subdivision of GWF. Mr. Murray solicited a job from Mr. Wohadlo, and Mr. Wohadlo, in turn, sent a letter to Mr. Phillips asking whether Mr. Phillips could find a place for the grievant. Mr. Phillips prepared the letter in response to Mr. Wohadlo's request, but neither he nor anyone else at N.E.C. called the grievant to inform him that a letter was available, nor did the grievant call N.E.C. to see if a letter was prepared requesting his dispatch. At the time the letter was written, Mr. Phillips testified, he had never met Mr. Murray nor talked to Mr.

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[2] Grievant Exhibit #1.

Murray by phone. The only contact Mr. Phillips had with Mr. Murray was the fact that Mr. Wohadlo had requested that he find a place for Mr. Murray.

Mr. Gary Barton, who acts as the employer's timekeeper, testified that on the same day that a request letter was written for the grievant, one was written for Raoul Luna. Mr. Luna picked up the letter and took it to the Union and was dispatched. According to Mr. Barton, Mr. Luna has been working for the Employer as a laborer ever since his dispatch. When the grievant came in to complain to the Employer about the fact that he was not dispatched to the job, Mr. Barton prepared a letter for Mr. Phillips' signature which states that the Union was notified by phone that Mr. Murray was going to be requested for N.E.C. work.[3] The letter was prepared at the request of Mr. Murray.

Mr. Gary Heberlein, a laborer working out of 324's hiring hall, testified that sometime on or about December 7, 1988 while he was in the hiring hall, Jessie Duran, one of the Union's agents, informed him that Mr. Murray had received a letter. According to Mr. Heberlein, when he told Jesse Duran, the Union's agent, that he did not know who Mr. Murray was, Mr. Duran responded, "Well, he is the guy who has been writing the letters to GWF kissing ass to get a job out there, and he finally got a letter." A week or two after this, Mr. Heberlein testified, he encountered Mr. Murray and told him, "I heard you were working out at N.E.C." In response to this, Mr. Murray told him, "No. I've been in school." He told Mr. Murray, "Well, they told me that you had a letter and you were out there working."[4] On January 4, Mr. Heberlein testified, he was dispatched to N.E.C. and has been working there since that date on a regular basis.

Mr. Murray testified that he was dispatched to the Laborers' training center on November 21, 1988 to par-

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[3] Grievance Exhibit #2.

[4] Tr. Page 52.

ticipate in a regularly scheduled training program at the center. During his stay, he received approximately $21 a day to cover meals and transportation. The course dealt with landscaping and was scheduled to last for four weeks. The course ended, according to Mr. Murray, on December 16, 1988. On the following Monday, December 19, Mr. Murray went to the Pittsburg hall of Local 324 to reactivate his "plug." It was while he was in the hall that he discovered that N.E.C. had written a letter requesting his services on one of its jobs. Mr. Murray called Mr. Phillips at N.E.C. and asked about the letter. He was informed that a letter was written and that it was held open for a period of a week, but that the employer filed the letter when the grievant failed to pick it up. Mr. Murray asked that this information be put in writing, and he went out and obtained a letter stating this information.[5] Mr. Murray testified that he never saw the letter requesting his services, nor did he believe anyone from the Union had seen the letter or had a copy of the letter.

POSITION OF THE PARTIES

GRIEVANT

The grievant argued that the undisputed testimony shows that a letter requesting the grievant's services was issued by N.E.C. on or about December 7, 1988. At that time, the grievant was attending the Laborers' training session, participating in a four-week landscaping course. Local 324 made no effort to contact the grievant at the training center to inform him of the requested dispatch. In the past, the grievant argued, when an employee has been at the training center, they have received dispatches to jobs, although the grievant conceded that he was not aware of any individuals from Local 324 that had received calls while they were participating in a training program at the training center. The failure of the Union to call the grievant was not accidental; it was intentional. The

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[5] Grievant Exhibit #2.

appropriate remedy, according to the grievant, was to compensate him for all of the time he could have been working at N.E.C. had he been dispatched properly.

UNION

The Union pointed out that the grievant could not name a single individual who had been dispatched by Local 324 when they were in the middle of a training session at the Laborers' training center. When an individual enrolls in a training program, it is anticipated that the employee will complete the course. The grievant acknowledged his unavailability by referring to reactivating his plug on December 19 when he finished the course. The testimony of the grievant which is accurate, the Union pointed out, is that when an individual is in the training center, their plug is maintained on the board just as if they were unemployed and in the hall. However, the Union does not dispatch from the hall while the person is in the training center because they are unavailable for work.

The facts in this case, the Union pointed out, establish that the grievant sought employment by writing to the president of GWF. The president of GWF then sent a letter to the local manager, Mr. Phillips, requesting that he find a place for the grievant. To accommodate his boss, the Union stated, Mr. Phillips wrote a letter for the grievant requesting his services. No one from N.E.C. bothered to contact the grievant, and the grievant never followed through to see whether N.E.C. would request his assistance. The Union was informed by N.E.C. on the telephone that a letter had been issued to Mr. Murray, but the Union followed the procedure that it has followed for many years which is to wait until the employee brings the letter from the employer before issuing a dispatch. Under the terms of the Contract, the Union does not have a right to dispatch an individual based on an oral request from the Employer. A named request such as the situation involving the grievant has to be in writing. As Mr.

Barton stated in his testimony, when he has, in the past, written a letter which an employee does not pick up, that employee is not dispatched from the hiring hall to the employer. It is the grievant who failed to properly follow through in this case, the Union pointed out and not the Union.

DISCUSSION

The Contract language affecting this dispute is clear and unambiguous. First, with respect to availability, the grievant's participation in the Laborers' training program clearly made him unavailable within the meaning of Section 3(b)(7). In order to be available for work, the individual must be "present at the hiring hall. . ." It is the opinion of this arbitrator that participating in a regularly scheduled four-week training program makes the employee unavailable for work through the dispatch process in the hiring hall. It is unlikely that the parties contemplated setting up regular training programs, paying participants to attend the programs, and then allowing the participants to be dispatched to other work halfway through the course. There is nothing in the contract which would suggest this conclusion, and it is not a conclusion which makes sense. The only sensible conclusion is that the grievant's participation in the training program, which was voluntary on his part, made him unavailable for work within the meaning of the Contract.

The grievant had no right to be dispatched on December 7, 1988 in the absence of a letter from N.E.C. The only information the Union had concerning N.E.C.'s request for the grievant was a telephone call informing the Union that the grievant had a letter which the Union could expect him to bring to the hall. The grievant, of course, failed to pick up the letter from N.E.C. and carry it to the Union. Without a written request, the Union was precluded from dispatching the grievant under Section 3(B)(6)(e). Had the Union dispatched the grievant in spite of the fact that he had no letter, some other employee in the hiring hall would have had a complaint

against the Union for which the Union would have been responsible for wages and fringe benefits.

For some reason, the grievant believed that the Union had an obligation to send someone over to the Laborers' training center and inform him that N.E.C. had a letter waiting for the grievant at its offices if the grievant wished to go over and pick it up. There is no contractual obligation on the part of the Union to assist employees in finding their own employment outside the scope of the hiring hall. If an employee chooses to find work outside the scope of the hiring hall, it is the obligation of the employee to meet all the requirements in order for the Union to dispatch the employee. The restrictions contained in the hiring hall rules and regulations are intended to make work available equally for all members of the Union. For the Union to assist an employee to find work outside the scope of the hiring hall rules would have the impact of discriminating against all of those other employees in the hiring hall who are attempting to seek work. Not only is what the grievant seeking a violation of the hiring hall rules and regulations, it is also contrary to the Union's publicly stated policy.

In summary, the grievant was not available for work on or about December 7 and could not have been dispatched to the N.E.C. job, even if he had a letter from the employer. The grievant was a participant in a training program which made him unavailable for work through December 16, 1988. Secondly, the grievant had no letter from N.E.C., nor did the Union have a letter from N.E.C. requesting the services of the grievant. The grievant sought a job from N.E.C. on his own outside the parameters of the hiring hall but failed to obtain a letter which would permit him to be dispatched to that job. The Union has no obligation to assist an employee in finding work outside the confines of the hiring hall. The grievance is denied.

AWARD

The Union did not violate the terms of the hiring hall provisions of the Laborers' Master Agreement in the manner in which it treated the grievant. The grievance is denied.

It is so ordered.

May 19, 1989

/s/ Gerald R. McKay
GERALD R. MCKAY
Arbitrator

Supreme Court, U.S.
FILED
NOV 1 1995
CLERK

(2)

No. 95-563

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CONSTRUCTION AND LABORER'S UNION LOCAL NO. 324, JESSE THOMAS, JESSE DURRAN, JR., JESSE DURAN, SR., and CHARLES EVANS,
Petitioners,

v.

DOUGLAS MURRAY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

SUPPLEMENTAL BRIEF

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APP

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---

SUPPLEMENTAL BRIEF

DEVELOPMENTS BEFORE THE COURT SUBSEQUENT TO THE FILING OF THE PETITION FOR CERTIORARI IN THIS CASE MERIT EITHER DELAY OF THE COURT'S DECISION WHETHER TO GRANT CERTIORARI OR TREATMENT OF THIS MATTER AS A COMPANION CASE.

It has come to Petitioners' attention that this Court recently heard oral argument on a case addressing the constitutionality of punitive damages, *BMW of North America Inc. v. Gore*, 94-896 ("*BMW*"). Since the issues in that case are relevant to this matter, Petitioners respectfully request that the Court defer its decision on the Petition for Certiorari in this case, with respect to the issue

of the constitutionality of the punitive damages imposed, until it rules in *BMW*. In the alternative, Petitioners ask that the Court consider this matter for possible treatment as a companion case to be decided concurrently with *BMW*.

One of the questions presented in *BMW* is whether a punitive damage award amounting to 500 times the compensatory damages assessed is grossly excessive in violation of the Due Process Clause of the Fourteenth Amendment. In the instant matter, Petitioners have asked the court to rule on whether a punitive damages award nearly 800 times the compensatory award against a union is unconstitutionally excessive and violates the national labor policy, articulated by this Court as implicit in the National Labor Relations Act, against imposing punitive damages against unions. *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979).

The Court may be able to dispose of much of its analysis of the substantive due process issues raised by the instant matter by reference to its opinion in *BMW*. This case merits further consideration, however, because of the implication of the conflict between the policy in favor of allowing civil juries to punish and deter wrongdoing with punitive damages and the labor policy against imposing punitive damages against unions. That conflict of policy provides an optimal context for examining the substantive contours of the appellate review of punitive damage awards required by the Due Process Clauses of the Fifth and Fourteenth Amendments. The failure of the courts below to take into consideration the policy articulated by this Court against imposing punitive damages against unions when reviewing the massive award in this case underscores the fact that, to satisfy due process, the procedure provided by appellate courts to review punitive damages must be substantively defensible. Otherwise, there is no assurance that punitive damages are imposed rationally. A mere right to review of punitive damages for reasonableness, if not coupled with a right to a correct determination

by an appellate court as to whether a punitive damages award is reasonable under all the circumstances of the case, is but a right to an empty ritual.

The Court may wish to decide this case concurrently with *BMW*, in order to provide as comprehensive as possible an analysis of the kind of substantively rigorous review an appellate court must conduct to satisfactorily address the constitutionality of a punitive damages award.

Petitioners wish to note, however, that the other two issues presented in this case, having to do with (1) removal of a known holdout juror during deliberations of a hung jury and (2) the conflict of duties under the National Labor Relations Act and the Labor Management Reporting and Disclosure Act created by the courts' rulings below, are not related to the *BMW* case. Thus, Petitioners ask that the Court not delay its decision whether to grant certiorari on those important issues.

CONCLUSION

Therefore, it is respectfully requested that the Court either defer its decision on the Petition for Certiorari in this matter, with respect to the punitive damages issue, until it issues an opinion in *BMW*, or consider treating this case as a companion to *BMW*.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 19 1996
CLERK

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---

MEMORANDUM IN OPPOSITION

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January 19, 1996

QUESTIONS PRESENTED

1. Did the court of appeals properly uphold the trial court's exercise of discretion to excuse a juror based on the particular circumstances of that juror and those of other jurors?

2. Did the court of appeals properly affirm a verdict for $77,500 in punitive damages, awarded for a series of retaliatory actions against a union dissident in violation of the Landrum-Griffin Act, where the plaintiff received only nominal compensatory damages of $100, on the ground that compensatory damages for free speech injuries are hard to measure?

3. Should the court of appeals have decided whether, in the circumstances of this case, damages could be awarded under the LMRDA for retaliatory denial of a referral for work at the union hiring hall, instead of affirming on the alternate ground that several other forms of retaliation had also been proved?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT 2

REASON FOR DENYING THE WRIT 9

Petitioners' Questions, to the Extent That They Were Preserved in the Court Below and Are Presented in This Case, Do Not Present Issues of Law on Which the Lower Courts Are Divided. . . 9

1. The Removal of Juror Giancoli 9

2. The Refusal to Tell Respondent About the Referral Letter 13

3. The Punitive Damages Issue 15

CONCLUSION 18

TABLE OF AUTHORITIES

CASES Page

BMW of North America v. Gore,
No. 94-896 (S. Ct) 16

Delta Air Lines v. August,
450 U.S. 346 (1981) 10

Doty v. Sewall,
908 F.2d 1053 (1st Cir. 1990) 17

Gertz v. Welch,
418 U.S. 323 (1974) 16

Green v. Zant,
715 F.2d 551 (11th Cir. 1983) 11

Guidry v. Operating Engineers,
882 F.2d 929 (5th Cir. 1989),
vacated 494 U.S. 1022 (1990),
on remand, 907 F.2d 1491 (5th Cir.1990) 17

IBEW v. Foust,
442 U.S. 42 (1979) 7, 17

McCraw v. Plumbers,
341 F.2d 705 (6th Cir. 1965) 18

Morgan v. Woessner,
997 F.2d 1244 (9th Cir. 1993) 8

NLRB v. Iron Workers Local 75,
583 F.2d 1094 (1978) 6, 14, 15

Page

Pacific Mut. Life Ins. Co. v. Haslip,
499 U.S. 1 (1991) 8

Petramale v. Laborers Local 17,
847 F.2d 1009 (2d Cir. 1988) 17

Quinn v. DiGiulian,
739 F.2d 637 (D.C. Cir. 1984) 17

Radio Station WOW v. Johnson,
326 U.S. 120, 128 (1945) 10

Reed v. UTU,
488 U.S. 319 (1989) 15, 18

Shimman v. Frank,
625 F.2d 80 (6th Cir. 1980) 18

Smith v. Wade,
461 U.S. 30 (1983) 18

United States v. Brown,
823 F.2d 591 (D.C. Cir. 1987) 11

United States v. Essex,
734 F.2d 832 (D.C. Cir. 1984) 11

United States v. Hernandez,
862 F.2d 17 (2d Cir. 1988) 11

United States v. Tabacca,
924 F.2d 906 (9th Cir. 1991) 11

United States v. Wilson,
894 F.2d 1245 (11th Cir. 1990) 11

Page

Vandeventer v. Operating Engineers Local 513,
579 F.2d 1373 (8th Cir. 1978) 17

STATUTES AND RULES

42 U.S.C. § 1983 18

Federal Rules of Civil Procedure,
Rule 50(a) 2

Labor-Management Reporting and Disclosure Act of 1959,
29 U.S.C. § § 401 *et seq.* . . . . . *passim*

National Labor Relations Act,
29 U.S.C. §§ 151 *et seq.* . . . . . 6, ,14, 15

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MEMORANDUM IN OPPOSITION

Petitioners ask the Court to grant certiorari to consider several questions relating to the excusing of a juror, appellate review of punitive damages awards, and the application of the Landrum-Griffin Act to forbid denial of work at a union hiring hall in retaliation for exercise of intra-union free speech. However, two of these questions are either not presented here or were not advanced below; nor is there any significant division of opinion among the lower courts on any of the questions. Instead, petitioners ask the Court to correct what they see as lower court errors in the application of well-established standards. Accordingly, the petition should be denied.

STATEMENT

This case arises out of a long-running dispute between respondent Douglas Murray, a member of petitioner Laborer's Local 324, and the individual petitioners, who are all officers or, in the case of petitioner Durran Sr., the father of an officer of the Local. Respondent is a long-time union activist who opposes the incumbents. He publishes a newsletter, *Pick and Shovel*, which has been highly critical of the petitioners, and he has run for office in opposition to the individual petitioners. In this case, respondent contended, and in large part the jury agreed, that petitioners had retaliated against him for this dissident activity, punishing him physically, economically, and otherwise. Thus, petitioners threatened him with physical injury; ordered him to stop speaking at union meetings and ejected him from union meetings; tore the *Pick and Shovel* down from bulletin boards where respondent had posted it; tried to have respondent arrested for distributing literature at the union hiring hall; deprived respondent of hiring hall referrals; and impounded his union dues to cover costs of an arbitration.

With the exception of a few claims on which District Judge Walker granted judgment as a matter of law under Rule 50(a) of the Federal Rules of Civil Procedure, respondent's claims went to trial before an eight-member jury. At the outset of the trial, Judge Walker advised the jury that the evidence would be finished by Thursday, February 18, so that it could begin deliberations by Friday. However, the trial took longer, and deliberations did not begin until Monday afternoon, February 23. The next day, the jury had to stop deliberating at 11 a.m. so that one of the

jurors could keep a previously scheduled engagement; the jury indicated that one of the jurors wanted to refrain from deliberating at all on Wednesday so that he could attend to various business matters that had accumulated. That juror, Giancoli, said that he could postpone some of these matters, but that he would have to leave late the next morning for a meeting that he could not postpone. Judge Walker expressed concern about the delays that would be entailed, but said that he preferred to let jurors work the schedule out among themselves. The jury indicated that they would prefer to recess so that Giancoli could return after his meetings.

The following day, after deliberations began, the jury sent out three notes, indicating that the jury was divided both on the resolution of the case and even on the schedule for jury deliberations. They included a schedule showing Giancoli's need to leave at 11:15 AM, two other jurors' need to leave during that afternoon, and still a fourth juror's desire to leave on Thursday and Friday for previously scheduled engagements. Because the jury was no longer agreed on the issue of scheduling, the court felt obligated to make the scheduling decisions itself. In that regard, the court expressed concern about the effects of repeated interruption of the jury's deliberations, while emphasizing that it was uncertain how the jury was divided.

At that point, petitioners' counsel, Ms. Benson, questioned whether it was wise to discharge Giancoli. Because Giancoli had said that the jury was "hopelessly divided," although seven jurors had said that they preferred to keep deliberating, Ms. Benson argued that it was possible the division was seven to one. Based on this assumption, she expressed concern lest, after the fact, the loser would claim that Giancoli's discharge constituted a denial of the right to

a unanimous jury. The judge replied that the division might or might not be seven to one, and Ms. Benson agreed, "You're absolutely correct. This is purely speculation."

Accordingly, the court discharged Giancoli. Later in the day the jury returned special verdicts finding various respondents liable for $100 in compensatory damages, and for a total of $77,500 in punitive damages, for violations of respondent's free speech rights under the LMRDA. Petitioners then obtained a declaration from Giancoli in which he said that he had become the lone holdout, that other jurors had urged him to leave the jury so that they could reach a unanimous verdict, and that he believed that the other jurors had purposefully voted to keep deliberating so that he would be removed from the jury. Based on this declaration, petitioners moved for a new trial, but this motion was denied.

Petitioners also objected to the punitive damages award, solely on the ground that it was disproportionate to the amount of compensatory damages. In argument on this motion, of which a transcript has been lodged with the Clerk, Judge Walker made clear that he took this argument seriously, but he ruled that, even if the difference between the two awards was great, the amount of punitive damages was not very great, and would not harm the union financially (there was evidence that both the union's annual income and its assets exceeded $1,000,000). Moreover, he noted that actual damages for violations of free speech rights are not easily quantified, and that the jury verdict represented their effort to ensure that the larger societal values represented by the LMRDA were vindicated.

Both sides appealed to the Court of Appeals for the Ninth Circuit. Petitioners argued first that the discharge of

juror Giancoli had violated their right to a unanimous jury verdict. However, unlike their petition, in the court below petitioners did not attribute bad motives to Judge Walker, or accuse him of discharging Giancoli for the purpose of removing an obstacle to a unanimous verdict. Instead, they relied on their after-the-fact affidavit from Giancoli to show that they were prejudiced by Giancoli's removal. App. Br. 22-24 (copies of the appellate briefs have been lodged with the Clerk). They then argued that, because the facts showed a possibility that Giancoli was a lone holdout juror, Ninth Circuit precedent required the court to inquire into the facts to determine whether the rest of the jury was trying to get rid of Giancoli. *Id.* 21, 24-28. They argued finally that Judge Walker's decision to remove Giancoli, although he allowed the jurors to suspend deliberations by mutual agreement the day before, was discriminatory, *id.* 28-29, and that under Ninth Circuit precedent, Giancoli's need to attend a business meeting during deliberations did not constitute "just cause" for his removal. Respondent, for his part, argued that the district judge had done the best he could with a very difficult situation, and that his discretionary decision not to allow further delays in deliberations so that various jurors could go off to attend to their private business, and removing Giancoli when he was unable to postpone his meeting, should be respected. In their reply brief, petitioners attacked the reasons given by respondent to support the district judge's exercise of discretion, Reply Br. 1-8, but they continued to argue only that, from the vantage point before Giancoli gave his affidavit, there was a "strong possibility" that he was a lone holdout. Petitioners still did not argue that he was a "known" holdout, nor accuse Judge Walker of deliberately discharging Giancoli because he was a minority of one.

Most of the rest of petitioners' appellate brief was devoted to arguing various aspects of the merits of their attacks on the verdicts based on the Landrum-Griffin Act and the common law of assault. With respect to the union's failure to call respondent to tell him that his referral had been requested by name by an employer, petitioners urged the Ninth Circuit not to follow the Fifth Circuit in holding that retaliatory denial of hiring hall referrals could infringe free speech in violation of the LMRDA, and that, in any event, the union's refusal to call respondent with this referral was required by the hiring hall agreement. Relying on a Ninth Circuit case, *NLRB v. Iron Workers Local 75*, 583 F.2d 1094 (1978), petitioners argued that, if in fact the hiring hall agreement allowed the refusal to convey the request, then their motives for denying the referral were irrelevant. Respondent, however, pointed out that the lower courts unanimously hold that hiring hall retaliation against union dissidents is actionable under the free speech provisions of the LMRDA. Moreover, respondent showed that, even if bad motivation was not actionable under the NLRA, it was actionable under the LMRDA, and that *Iron Workers* was distinguishable because the union there had followed an express, written rule, while here, not only was there was no written rule forbidding the union from calling members to tell them of name requests, but the evidence showed that other members had received such calls.

The question of punitive damages received very abbreviated treatment from petitioners in the court below, only three pages in their 50 page opening brief and a page and a half in a 26 page reply brief. Petitioners advanced two arguments. First, they argued that the punitive damages were necessarily excessive solely on the ground that such

damages were many times the amount of compensatory damages. Second, they argued that this Court's decision in *IBEW v. Foust*, 442 U.S. 52 (1979), refusing to allow awards of punitive damages for breach of the duty of fair representation, barred such damages under the LMRDA as well.

The court of appeals unanimously affirmed in every respect. 55 F.3d 1445. The court readily agreed with petitioners that a juror's refusal to join a verdict to which all other jurors agree is not cause for discharge. However, "this type of case readily invites an appellate court to second-guess a trial court. This is a temptation we must resist . . .." *Id.* at 1451. The court distinguished a Second Circuit case where the trial judge had apparently removed a juror, two days after receiving complaints from other jurors that he was disruptive and irrational, on the ground that the juror "would not 'change his mind'"; these facts suggested that the removal was based on his disagreement with his fellow jurors. Here, by contrast, the notes from the jury were ambiguous, and nothing in the judge's remarks suggested that he removed Giancoli because the latter was perceived as the obstacle to a unanimous verdict. A Ninth Circuit case was distinguished on the ground that there, a juror had been discharged at the first sign of scheduling conflicts among the jurors, unlike this case where the judge tried to accommodate scheduling problems until they appeared to endanger the jury's orderly deliberations. *Id.* at 1452.

Turning to the merits of the case, the court of appeals found it unnecessary to address petitioners' argument that their failure to contact respondent about the employer's referral letter could not be a violation of the LMRDA. Indeed, the court acknowledged that this might be a valid

argument. *Id.* 1542. However, the court found substantial evidence with respect to other free speech violations to support the jury's verdicts, including an attempt to confiscate respondent's newsletters, the suppression of his dissenting views at a union meeting, and the use of his union dues for arbitration costs. In combination, the court held, these facts "suffice to establish a general scheme to suppress dissent within the union. [citations omitted]. Clearly, the jury believed Murray's version of events." *Id.* at 1452-1453.

On the question of punitive damages, the court of appeals applied the three-part test it enunciated in *Morgan v. Woessner*, 997 F.2d 1244 (9th Cir. 1993), to comply with this Court's ruling in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). First, it ascertained that the district judge properly instructed the jury on the purpose of punitive damages. Second, it noted that the trial judge had properly explained why he upheld the jury's verdict, giving consideration to the amount of punitive damages by comparison to the facts of the case, including consideration of similar cases. The court specifically noted, and approved, Judge Walker's refusal to overturn the verdict solely because punitive damages were so much higher than compensatory damages, in light of the fact that free speech rights are intangible, whose infringement was "the sort of thing that you can't really put a price tag on." *Id.* at 1453. Finally, the court conducted its own review for excessiveness to determine whether it exceeded the amount needed to accomplish the goals of punishment and deterrence, but found that the awards were not grossly excessive "given the seriousness of the infringement on Murray's free speech rights." *Id.*

REASONS FOR DENYING THE WRIT

PETITIONERS' QUESTIONS, TO THE EXTENT THAT THEY WERE PRESERVED IN THE COURT BELOW AND ARE PRESENTED IN THIS CASE, DO NOT PRESENT ISSUES OF LAW ON WHICH THE LOWER COURTS ARE DIVIDED.

In large measure, the questions raised by petitioners either were not presented below or are not presented in this case, and in any event, those questions have not divided the lower courts. Rather, petitioners squeezed into their thirty-page petition a grab-bag of objections to the manner in which the court below resolved their objections to the jury's verdict. In a number of respects, however, the arguments presented to this Court differ greatly from the contentions that they presented (and thus preserved) in the court of appeals. One of their arguments (their second question presented) although made below, is not presented here because the court of appeals found it unnecessary to reach it, and expressed no opinion on it. Moreover, in large part, the issues that they seek to present to this Court are not ones on which there is division among the courts of appeals. We think the court below was correct in each respect, but in any event the mere correction of alleged lower court error is not a basis for this Court to grant certiorari here.

1. The Removal of Juror Giancoli.

Petitioners' first question is whether the district court's removal of (1) "a known solitary hold-out juror," (2) "late in the deliberations of an apparently hung jury," in order (3) "to avoid a half-day delay in deliberations," violated their right to a unanimous jury. Pet. at i. Their petition not only repeatedly asserts that the district judge knew that Giancoli was a holdout on a hung jury, but accuses the judge of

deliberately removing Giancoli for that reason. However, as we explain below, not only is the accusation of improper motive not correct, but it was not even argued below. Moreover, none of the three above-numbered factual predicates of this question accurately characterize the record in this case. The first question is thus not a reason to grant review.

If the motive of removing a holdout juror had been the reason for Giancoli's removal, the court of appeals's opinion makes clear that it would have been quick to reverse. However, that court did not believe that Judge Walker had either the knowledge or the motive that petitioners now attribute to him, and petitioners did not make these accusations before the court of appeals. In the court below, petitioners argued only that there were some indications from which the trial judge **might** have inferred these facts, that the evidence was sufficient to require the district judge to inquire further, and that the removal of Giancoli in these circumstances was discriminatory. Because petitioners did not make the "improper reason for removal" argument below before seeking rehearing, they have not preserved it. *Delta Air Lines v. August*, 450 U.S. 346, 362 (1981); *see Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945). And because the court of appeals not only did not believe that Judge Walker had the bad motive now attributed to him, but also found the pre-discharge evidence of Giancoli's status as a sole holdout to be ambiguous at best, its opinion cannot stand for the proposition that petitioners must make of it in order to establish a conflict among the circuits. Thus, in addition to not being preserved, petitioners' first question is not genuinely presented in this case.

In any event, there is general consensus among the lower courts about the standards by which claims of denial of a unanimous verdict through the removal of jurors are to be judged (in criminal cases, at least), and the cases cited by petitioners reflect that consensus. A juror cannot be excused without a good reason, and the reason must be stated on the record. *United States v. Tabacca*, 924 F.2d 906, 914-915 (9th Cir. 1991); *United States v. Essex*, 734 F.2d 832 (D.C. Cir. 1984). Although the decision about whether to discharge a juror will be upheld absent an abuse of discretion, so long as there is a finding of just cause on the record, *United States v. Wilson*, 894 F.2d 1245, 1250 (11th Cir. 1990), the fact that the juror is a holdout against a unanimous verdict is not an acceptable reason, and if there is substantial uncertainty whether that is why the juror was discharged, the resulting verdict must be overturned. *United States v. Hernandez*, 862 F.2d 17 (2d Cir. 1988); *United States v. Brown*, 823 F.2d 591 (D.C. Cir. 1987); *Green v. Zant*, 715 F.2d 551 (11th Cir. 1983).

Petitioners rely on the foregoing cases to support the proposition that "even a hint that a juror is a holdout against an otherwise unanimous verdict precludes her dismissal." Petition at 11-12. But the courts have not gone quite so far; the most they have said is that, unless the court can be certain that the **reason** for the removal was not status as a unanimous holdout, reversal is required. *E.g.*, *United States v. Hernandez*, 862 F.2d 17 (2d Cir. 1988). Here, the court below ruled that "neither his remarks nor his actions indicate in any way that he chose to remove juror Giancoli" for an improper reason, 55 F.3d at 1451, and even petitioners did not claim that the district judge had such an improper reason

until the court below had issued its opinion affirming the judgment.

In order to reach the legal question that their petition seeks to present, petitioners are compelled to take issue with the lower court's assertion that there is no indication of bad motive. But the key factual predicate for a claim of improper motive — that Giancoli was a "known sole holdout juror" — was conceded away by petitioners' own counsel in her argument to the district court before Giancoli was discharged. At that time, she raised the possibility that the jury might be in a seven-to-one position, but she readily agreed, when the judge said, "maybe so, and maybe not," that her thoughts on this point were "purely speculative." Only after petitioners' counsel had had the opportunity to interview juror Giancoli and obtain an affidavit from him did she develop the post hoc theory by which petitioners now question the district court's judgment. But motive cannot be attributed based on evidence that was presented only after the district court acted.

The other two factual predicates for petitioners' argument are also missing. At the time juror Giancoli was discharged, it was not "late in the deliberations," and it was not at all clear that the jury was hung. The jury had deliberated for less than ten hours — from 12:30 Monday through the afternoon, until only 11 AM on Tuesday, and then from 8 AM to 10 AM in Wednesday. At first the entire jury had indicated that a unanimous verdict was impossible, but later most of the jurors indicated that they thought they were close to a verdict, while one juror, who had suggested that there be no deliberations at all on Wednesday, and had to leave by 11:15 to make his business meeting, sent out a note saying that the jury was "hopelessly divided." Neither

the district court nor the court of appeals found a clear message that the jury was hung from these "mixed signals," 55 F.3d at 1450, and it is only with the benefit of hindsight (and Giancoli's affidavit) that petitioners are able to argue that matters were clear. Moreover, although Giancoli needed to be absent only on Wednesday, the schedule provided by the jurors showed that another juror, Caroe, had her own affairs to attend to on Thursday and Friday; the district court could not accommodate one without accommodating the other. In these circumstances, the trial judge was entitled to decide not to allow the continual postponement of deliberations; the court of appeals was right to uphold his exercise of discretion; and, in any event, petitioners' arguments are not worthy of review by this Court.

2. The Refusal to Tell Respondent About the Referral Letter.

Petitioner's third question is also not properly presented here. There is no doubt that petitioners made below the legal argument on which they seek review here, but the court of appeals found it unnecessary to consider that issue. Petitioners' refusal to tell respondent that an employer had asked for him by name was, after all, only one of a series of incidents in which respondent claimed that petitioners had retaliated against him for speaking out against what he considered to be the individual petitioners' mismanagement of the union, and even if the referral letter incident was legally nonactionable, the other incidents were both actionable and supported by substantial evidence. Thus, the court of appeals responded to petitioners' referral letter argument by saying that "possibly" it was correct, but that it did not warrant reversal in any event. Although petitioners take issue with these alternate grounds for affirmance in a

footnote in their petition, at 28-29 n.13, they do not suggest that these rulings should be reviewed on certiorari. In any event, because the court of appeals did not even address petitioners' argument, not to speak of rejecting it, there is no reason to grant certiorari to consider it now.

Nor, for that matter, is there disagreement among the courts of appeals on the second of petitioners' questions presented. The only lower court decision that petitioners contend is contrary to the jury's verdict is a previous decision of the Ninth Circuit itself, where the court of appeals ruled that, when a union complied with written provisions of its hiring hall agreement, the National Labor Relations Board could not inquire into the reasons for such compliance in order to find a breach of the duty of fair representation. *NLRB v. Iron Workers Local 75*, 583 F.2d 1094 (1978). A supposed intra-circuit conflict, although possibly a good reason for rehearing en banc, would not justify a grant of certiorari.

In any event, respondent's claim is not foreclosed by *Iron Workers*. In that case, a specific written provision limited the right to receive requests by name to workers with at least four years' experience. The court of appeals noted that the NLRA required compliance with written rules, and held that, if the union complied with those rules in not accepting a request by name for a less experienced worker, it was irrelevant under the NLRA why it did so. Here, by contrast, not only was there no written rule in the hiring hall agreement forbidding communication with recipients of referral requests, but the union training center, where

respondent was at the time of the request, had a policy of taking messages for workers in attendance there.[1]

Finally, the evidence was that, whether or not the union was forbidden to convey such messages, it sometimes did convey them. Respondent argued — and the jury apparently agreed — that an inference should be drawn that the union deliberately refrained from conveying the message to respondent because of its animus against him. Because the issue in a free speech retaliation case is one of good or bad motive, this was a proper subject for consideration even if it could not be considered under the NLRA. This Court has observed that the LMRDA was enacted precisely because Congress believed that the NLRA did not afford union dissidents adequate protection against union abuses. *Reed v. UTU*, 488 U.S. 319, 332 (1989). Thus, even if motive may not be considered under the NLRA (assuming that *Iron Workers* is good law), free speech cases under the LMRDA present very different considerations.

3. The Punitive Damages Issue.

Petitioners' second question presented combines two separate issues. First, they accuse the court of appeals of being too cursory in its review of the punitive damages portion of the verdict, which they argue warrants reversal solely because it was much greater, proportionally, than the compensatory damages awarded. Second, they argue that

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[1] To be sure, an arbitrator considering respondent's grievance under the hiring hall agreement over the union's failure to provide the message refused to find that the union violated its agreement by failing to convey the message to respondent. He went on to say that the union could not convey such messages, but, as respondent argued below, this holding was dictum and hence not binding on respondent.

punitive damages cannot be awarded against unions under the LMRDA. Neither portion of the question warrants review.

First, the court of appeals gave petitioners' punitive damage award as much attention as it deserved. Petitioners did not argue in the court of appeals for a general review of the excessiveness of the punitive damages; their only argument on punitive damages, apart from the contention that they are generally improper against unions, was based on the fact that the punitives were almost 800 times the compensatories. The court of appeals' response to this contention, echoing the district judge, that an award of $77,500 should not be reduced just because free speech violations are inherently difficult to quantify, was well taken.

In this regard, the case is wholly unlike *BMW of North America v. Gore*, No. 94-896, on which petitioners' supplemental memorandum in support of certiorari relies. In that case, the $5,000,000 punitive damage award was far in excess of the compensatory damages for harm to property, a wholly tangible injury for which monetary damages are easily measured. By contrast, it is well-established that the receipt of nominal damages is not a bar to the award of punitive damages. Indeed, under *Gertz v. Welch*, 418 U.S. 323, 349-350 (1974), a libel plaintiff who satisfies the standard of "actual malice" may obtain quite substantial punitive damages even if he sustains **no** actual damages. Accordingly, petitioners' earlier concession that respondent's $100 damage award amounts to nominal damages, Pet. at 22 n.12, undermines their contention that this case should be held for disposition in light of *BMW*.

Even though the union argued only based on the ratio between compensatory and punitive damages, the court of appeals addressed each of the three factors in its test for

punitive damages. Having failed to address all of these factors in their briefs below, petitioners now take the court of appeals to task for its supposed failure to provide more specifics on each of the other factors. But a case where petitioners made only a cursory objection to punitive damages is not a likely vehicle for deciding just how detailed the appellate court's opinion must be.

Petitioners' last contention is that awarding punitive damages against unions is contrary to national labor policy, for which they cite *IBEW v. Foust*, 442 U.S. 42 (1979). *Foust* holds that punitive damages may not be awarded in duty of fair representation ("DFR") cases. The *Foust* majority expressly reserved the issue of whether such damages may be awarded under the LMRDA. *Id.* at 47 n.9. Justice Blackmun's concurring opinion approved of this reservation, while expressing the *fear* that the opinion might imply that punitive damages were unavailable in LMRDA cases. No Justice advocated a prohibition on punitive damages in such cases.

Petitioners do not suggest that there is any division among the lower courts about whether punitive damages may be awarded under the LMRDA, and with good reason — the circuits, both before and since *Foust*, are unanimous in permitting punitive damages in LMRDA cases. *E.g.*, *Doty v. Sewall*, 908 F.2d 1053, 1062 (1st Cir. 1990); *Guidry v. Operating Engineers*, 882 F.2d 929 (5th Cir. 1989), *vacated on other grounds*, 494 U.S. 1022 (1990), *on remand*, 907 F.2d 1491 (5th Cir. 1990); *Quinn v. DiGiulian*, 739 F.2d 637, 651 (D.C. Cir. 1984); *Vandeventer v. Operating Engineers Local 513*, 579 F.2d 1373, 1380 (8th Cir. 1978); *see also Petramale v. Laborers Local 17*, 847 F.2d 1009, 1013 (2d Cir. 1988). Moreover, punitive damages may be

awarded for civil rights violations under 42 U.S.C. § 1983, *Smith v. Wade*, 461 U.S. 30 (1983), and the LMRDA is more closely analogous to section 1983 than to the DFR. *Reed v. UTU*, 488 U.S. 319, 327-334 (1989). Accordingly, the availability of punitive damages is not a substantial question warranting this Court's review.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 19, 1996

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[2] *McCraw v. Plumbers*, 341 F.2d 705, 710 (6th Cir. 1965), is sometimes cited as taking the opposing view. That case involved a union member's claim for lost wages incurred before his suspension from membership, which the court denied on the ground that only damages that are "directly and proximately caused" by an LMRDA violation may be awarded. Although it is not clear that McCraw was seeking punitive damages, the same court later indicated that *McCraw* implied that punitive damages would be unavailable, while simultaneously questioning the "present viability" of that aspect of *McCraw*. *Shimman v. Frank*, 625 F.2d 80, 101 (6th Cir. 1980).

Supreme Court, U.S.
FILED
JAN 30 1996
CLERK

No. 95-563

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CONSTRUCTION AND LABORER'S UNION LOCAL NO. 324,
JESSE THOMAS, JESSE DURRAN, JR.,
JESSE DURRAN, SR., and CHARLES EVANS,
Petitioners,

v.

DOUGLAS MURRAY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

19 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
ARGUMENT	3
I. PETITIONERS RAISED THE ISSUE OF THE TRIAL JUDGE'S IMPROPER MOTIVE FOR REMOVING THE HOLDOUT JUROR IN THEIR MOTION FOR JUDGMENT AS A MATTER OF LAW AND NEW TRIAL AND NINTH CIRCUIT APPELLATE BRIEF BELOW	3
II. THE NINTH CIRCUIT'S AFFIRMANCE OF LMRDA LIABILITY FOR CONDUCT REQUIRED OF PETITIONERS BY THE NLRA CONTRAVENED CONGRESSIONAL INTENT IN ENACTING THE NLRA AND CREATED AN IRRECONCILABLE FEDERAL STATUTORY CONFLICT	5
III. RESPONDENT'S ARGUMENTS IN OPPOSITION TO GRANTING CERTIORARI IGNORE THE PRINCIPLES ENUNCIATED IN *INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS v. FOUST* AND FAIL TO ADDRESS THE SUBSTANTIVE INADEQUACY OF THE NINTH CIRCUIT'S REVIEW OF THE PUNITIVE DAMAGES AWARD IN THIS CASE	6
CONCLUSION	8
APPENDIX A	1a
APPENDIX B	4a

TABLE OF AUTHORITIES

CASES — Page

Breininger v. Sheet Metal Workers Int'l Assn., Local Union No. 6, 493 U.S. 67 (1989) 5, 6

Honda Motor Co. v. Oberg, 512 U.S. ——, 129 L.Ed.2d 336 (1994) 7

International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42 (1979) 2, 6, 7

NLRB v. Iron Workers Local 75, 583 F.2d 1094 (9th Cir. 1978) 6

Paramount Mutual Life Insurance Co. v. Haslip, 499 U.S. 1 (1991) 7

TXO Production v. Alliance Resources, —— U.S. ——, 125 L.Ed.2d 366 (1993) 7

United States v. Doe, 465 U.S. 605 (1984) 7

FEDERAL STATUTES

Labor Management Reporting and Disclosure Act ..... *passim*

§§ 101(a) (5) and 609, 29 U.S.C. §§ 411(a) (5) and 529 5

§ 102, 29 U.S.C. § 412 5

42 U.S.C. § 1983 2

National Labor Relations Act, 29 U.S.C. § 151, *et seq.* ..... *passim*

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF

INTRODUCTION

Respondent's brief in opposition to the Petition for Certiorari, written by an attorney who was not counsel of record at trial or appeal below, mischaracterizes the record, ignores the reasoning of the courts in the cases cited, and attempts to distract this Court from key issues raised in the petition.

The trial court's motive for removing Juror Giancoli was stated as a basis for reversal both in Petitioners' Motion for Judgment as a Matter of Law and a New Trial and their Ninth Circuit appellate brief. Moreover,

Petitioners cogently argued that the judge's knowledge that Giancoli was a holdout and his purpose in removing Giancoli to obtain a quick verdict were discernible from the circmumstances presented at trial, regardless of Giancoli's subsequent, consistent declaration.

Respondent claims that the collective bargaining agreement at issue in this case did not prohibit the Union from notifying Douglas Murray, in his absence from the hiring hall, that an employer had requested him by name. However, Respondent also acknowledges that an arbitrator had previously ruled that the union was actually prohibited by its agreement from so advising Murray. Respondent attempts to avoid the effect of that ruling by characterizing the arbitrator's reasoning as "dicta." However, Arbitrator McKay is the permanent, neutral, hiring hall arbitrator, vested with the authority to interpret the contractual provisions at issue in this case. His rulings cover any conduct relating to the hiring hall and his interpretation of the agreement is binding on the parties to this dispute. The law is well settled that an arbitrator's interpretation of a collective bargaining agreement becomes part of that agreement and is binding on the parties.

Finally, Respondent's attempt to distinguish the Court's reasoning in *International Brotherhood of Electrical Workers v. Foust,* 442 U.S. 42 (1979) ignores the Court's reasoning in that case. There, this Court was concerned with avoiding penalizing other dues paying members for union misconduct by weakening their representative with crippling damage awards. Thus, Respondent's analogy to 42 U.S.C. § 1983 cases is inapposite. Respondent also fails utterly to address Petitioner's discussion of the substantive shortfall of the Ninth Circuit's meager review of the punitive damage award in this case. The parameters of such review are a matter of federal Constitutional law. As such, the decisions of this Court, not those of the Ninth Circuit, are controlling.

For those reasons, Respondent's reply brief does not rebut Petitioners' demonstration that important issues, meriting review by this Court, have been presented.

ARGUMENT

I. PETITIONERS RAISED THE ISSUE OF THE TRIAL JUDGE'S IMPROPER MOTIVE FOR REMOVING THE HOLDOUT JUROR IN THEIR MOTION FOR JUDGMENT AS A MATTER OF LAW AND NEW TRIAL AND NINTH CIRCUIT APPELLATE BRIEF BELOW

Respondent claims that Petitioners failed to argue below that the trial judge was improperly motivated to dismiss Juror Giancoli in order to alleviate a seven to one deadlock. The current counsel for Respondent only very recently took over work on this case. He was neither counsel of record at trial nor before the Ninth Circuit. Accordingly, he may not have the entire record in his possession. In any event, his assertion is mistaken.

In her memorandum in support of her Motion for Judgment as a Matter of Law and a New Trial, counsel for Petitioners argued that

> the Court was well aware that the jury was deadlocked having received at least three notes to that effect, and having received a note signed solely by Mr. Giancoli on the date that he was released stating that the jury was "hopelessly divided."

(App. A, p. 3a, *infra*) Counsel for Petitioners also argued that "the court was apparently so anxious to obtain a verdict" that it rejected counsel's suggestion that Giancoli be allowed to continue deliberations for the remaining hour and fifteen minutes before he had to leave or that the court determine whether the jurors needed any clarification of instructions. (App. A, p. 1a, *infra*)

In her brief to the Ninth Circuit, counsel for Petitioners raised the same arguments (App. B, pp. 4a, 6a *infra*)

Thus, Respondent's claim that the judge's improper motive for dismissing Giancoli was not raised below is belied by the record. Nor is Respondent's effort to characterize the arguments below as resting solely on Juror Giancoli's declaration accurate. The citations above and the excerpts of record already submitted to this Court make clear that Petitioners based their discussion of the judge's intent on his conduct and the objective circumstances within which he acted. Petitioners will not repeat their discussion of the jurors' notes or the judge's statements here, but the Court is encouraged to review pages 4 and 5 of the Petition and the cited references to the appendix.

Respondent's contention that Juror Giancoli's removal was proper because, at the time of his dismissal, it was only speculation that Giancoli was a holdout juror demonstrates Respondent's failure to understand the Constitutional importance of untampered jury deliberations and the right to a unanimous verdict. Because of the standard jury instructions which inform jurors not to comment upon the substance of their deliberations, unless a juror stands up and announces that he or she is a "lone holdout," the juror's status at the time of his or her dismissal from the jury is *always* speculative. It is precisely because of the speculative nature of the juror's status at the time of dismissal that the courts do not hesitate to order a new trial where there is a "possibility" or even a "hint" that the dismissed juror may have been a lone hold-out juror. (See cases cited at pages 11-12 of the Petition). While Giancoli's status may have been speculative, there was certainly a good possibility and, indeed, a probability that he was a lone hold-out juror at the time he was dismissed, and this possibility was adamantly pointed out by Petitioners' counsel at the time the court was contemplating the dismissal. The court, however, simply gave short shrift to those concerns expressed by Petitioners' counsel and dismissed Giancoli even before his actual time conflict arose, thereby denying Petitioners their Constitutional right to a unanimous jury verdict.

II. THE NINTH CIRCUIT'S AFFIRMANCE OF LMRDA LIABILITY FOR CONDUCT REQUIRED OF PETITIONERS BY THE NLRA CONTRAVENED CONGRESSIONAL INTENT IN ENACTING THE NLRA AND CREATED AN IRRECONCILABLE FEDERAL STATUTORY CONFLICT

Respondent attempts to distract this Court's attention from the Ninth Circuit's contravention of Supreme Court precedent and Congressional intent regarding the National Labor Relations Act and the Labor-Management Reporting and Disclosure Act in three ways. First, counsel erroneously emulates the Ninth Circuit by claiming that Petitioners' liability under the LMRDA was based on conduct other than the failure to notify Respondent that an employer had requested him by name through the hiring hall. However, the record is clear that the only basis upon which the jury could have imposed its $10,000 punitive damage award on Petitioner Durran, Jr., was the hiring hall referral issue. See Petition, pp. 25-26. A mere gesture by the Ninth Circuit to the record as a whole did not change that fact.

Secondly, counsel ignores the significance of Arbitrator McKay's binding interpretation of the collective bargaining agreement at issue in this case. The parties' agreement, as interpreted, *prohibited* Petitioners from notifying Murray of the employer's request. To have violated the agreement would have constituted an unfair labor practice under the National Labor Relations Act. This Court has been clear on that point. See *Breininger v. Sheet Metal Workers Int'l Assn., Local Union No. 6*, 493 U.S. 67, 76 (1989).

This Court has also held that a concedely improper failure to refer is not "discipline" within the meaning of the LMRDA §§ 101(a)(5) and 609, but has not yet ruled whether the same is true of § 102. Here, it was determined by all (the arbitrator, the National Labor Relations Board, the District Court, and the Ninth Circuit)

that the failure to notify was *not improper*, but was required, under the hiring hall rules contained in the collective bargaining agreement, yet Petitioners were held liable for an LMRDA violation.

Thus, this case presents important questions regarding the interpretation of the LMRDA and creates a conflict between the requirements of the NLRA and the LMRDA, leaving unions in the untenable position of either violating the duty of fair representation or violating the LMRDA. Resolution of that conflict merits the attention of this Court.

Finally, Respondent tries to characterize Petitioners' arguments on this issue as resting solely on a Ninth Circuit case (*NLRB v. Iron Workers Local 75*, 583 F.2d 1094 (9th Cir. 1978)) and only involving an intracircuit conflict. As discussed above and in the Petition, a conflict with Supreme Court precedent (*Breiringer*, *supra*) and a statutory contradiction are at issue. Thus, this case involves *not only*, but *also*, a conflict within the Ninth Circuit.

III. RESPONDENT'S ARGUMENTS IN OPPOSITION TO GRANTING CERTIORARI IGNORE THE PRINCIPLES ENUNCIATED IN *INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS v. FOUST* AND FAIL TO ADDRESS THE SUBSTANTIVE INADEQUACY OF THE NINTH CIRCUIT'S REVIEW OF THE PUNITIVE DAMAGES AWARD IN THIS CASE

Finally, Respondent attempts to distinguish this Court's prior discussion of punitive damage awards against unions in *IBEW v. Foust*, *supra*, by dwelling on the fact that *Foust* involved a DFR violation while this case involves an alleged violation of the LMRDA. That issue was discussed at length in the petition at pages 23-24.

Respondent fails to address the Court's *reason* for invalidating the award in *Foust*: to avoid depleting "union

treasuries, thereby impairing the effectiveness of unions as collective-bargaining agents." 442 U.S. at 50. Respondent has provided no explanation for why the same reasoning does not apply in this context. The existence of Court of Appeals decisions supporting punitive damages for LMRDA violations does not negate the jurisprudential significance of this Court's reasoning in *Foust*. A conflict between a Court of Appeals decision and a Supreme Court decision, such as is presented here, is one of the strongest reasons of all for granting certiorari. See, e.g., *United States v. Doe*, 465 U.S. 605, 610 (1984).

None of the cases cited by Respondent for the proposition that punitive damages may be imposed for LMRDA violations are on point. Here, the conduct that the LMRDA violation allegedly was based on was *required* by the NLRA and the parties' agreement. It is inconceivable that Congress intended to subject unions to crippling liability under the LMRDA for conduct mandated by the NLRA.

It is telling that Respondent makes no meaningful effort to contest the arguments presented at Petition pages 17 to 23 regarding the substantive inadequacy of the Ninth Circuit's review of the punitive damages award in this case. Respondent apparently claims that it was Petitioner's responsibility to ensure that the Ninth Circuit's review was substantively sufficient. In addition to attributing power to Petitioners beyond that allocated to parties under our legal system, Respondent's argument ignores the fact that review of punitive damage awards for conformity with due process requirements is governed by federal Constitutional law, not the parties' pleadings or Ninth Circuit case law. See, e.g., *Honda Motor Co. v. Oberg*, 512 U.S. ——, 129 L.Ed.2d 336 (1994); *TXO Production v. Alliance Resources*, —— U.S. ——, 125 L.Ed.2d 366 (1993); *Paramount Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991).

CONCLUSION

For the foregoing reasons and those stated in the Petition for Certiorari and the Supplemental Brief, as well as on the record as a whole, Petitioners suggest that certiorari should be granted in this case to resolve these important federal constitutional and statutory issues.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No: C 89-4209 VRW
C 90-1712 VRW

DOUGLAS MURRAY,

Plaintiff,

VS.

LABORERS UNION LOCAL NO. 324,
JESSE THOMAS, JESSE DURRAN, JR., JESSE DURRAN, SR.,
CHARLES EVANS, and BOB DAVIS,

Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW (JNOV) AND IN SUPPORT OF DEFENDANTS' MOTION FOR NEW TRIAL

* * * *

[9] Even before Giancoli was formally removed from the jury panel, defense counsel indicated her concern that the jury was divided seven-to-one and that it would be inappropriate to remove Mr. Giancoli from the panel. The Court, however, was apparently so anxious to obtain a verdict that it even rejected Ms. Benson's suggestion that Giancoli be permitted to continue deliberating with the jury for the remaining hour and fifteen minutes before he had to leave and that the Court ask the jurors if they needed further clarification on any of the instructions which would perhaps help them reach a decision. Ms. Benson noted that the Court could then see whether it was facing the same problem later on in the day:

"MS BENSON: May I make one suggestion, Your Honor? I know yesterday you mentioned to them that if there were instructions they felt they needed further clarification on, that you would be happy to do so.

Perhaps—I mean, Mr. Giancoli still has an hour and fifteen minutes before he has to leave. Perhaps when you bring them in, you could remind them, 'is there a certain area that you would like the Court to give some further instructions or clarification,' just to see if—if there is an area in which you can assist them in breaking whatever deadlock there is.

And then if, come 11:30, this hasn't helped, then I can see that we're facing this problem. But maybe just reminding them that you can give them some clarification if there's something that's really sticking. That maybe, that might help them a little bit."

(Transcript February 24, 1993, pp. 5-6)

Defense counsel's suggestion was, however, rejected by the Court and Mr. Giancoli was dismissed from the jury before the time had even come when he had to leave for his Board meeting.

* * * *

[14] juror's removal. Finally, the Court noted that the jury had informed the Court that it was deadlocked on Friday, and it returned a guilty verdict within two hours of Pope's being excused. All of those issues combined convinced the Court that the Defendant had been denied his right to a unanimous verdict, and that the conviction had to be reversed and the matter remanded for a new trial.

In the instant case, the same factors which influenced the Ninth Circuit's decision in *Tabacca* are present. The case here was not an especially long case; Mr. Giancoli would have been able to return the next day; he indicated

on the juror's schedule that he had "no restrictions Thursday and Friday"; a delay of ½ day (or the afternoon) was "unlikely to induce dull memories on the part of the jurors"; the reason for his inability to continue deliberating on the afternoon of the 24th did not involve illness or any physical inability to deliberate (indeed, he had even less restrictions upon his ability to deliberate than Juror Caroe); the Court was well aware that the jury was deadlocked having received at least three notes to that effect, and having received a note signed solely by Mr. Giancoli on the date that he was released stating that the jury was "hopelessly divided"; and the jury returned a unanimous verdict less than an hour after Mr. Giancoli was removed from the jury.

Based upon the facts and the law, the Defendants were denied their right to a unanimous verdict by virtue of the Court's having improperly removed Mr. Giancoli from the jury. As such, the Defendants are entitled to a new trial.

* * * *

APPENDIX B

IN THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

Nos. 93-15641, 93-16176 and 93-16540

DOUGLAS MURRAY,
and Cross-Appellant
Plaintiff-Appellee,

vs.

LABORERS UNION LOCAL NO. 324, *et al.*,
JESSE THOMAS, JESSE DURRAN, JR., JESSE DURRAN, SR.,
CHARLES EVANS, and BOB DAVIS,
Defendants-Appellants
and Cross-Appellees.

APPELLANTS' OPENING BRIEF

* * * *

[25] In response, the Court was apparently so anxious to obtain a verdict that it even rejected Ms. Benson's subsequent suggestion [26] that Giancoli be permitted to continue deliberating with the jury for the remaining hour and fifteen minutes before he had to leave and that the Court ask the jurors if they needed further clarification on any of the instructions which would perhaps help them reach a decision. Ms. Benson noted that the Court could then see whether it was facing the same problem later on in the day:

> "MS BENSON: May I make one suggestion, Your Honor? I know yesterday you mentioned to them that if there were instructions they felt they needed further clarification on, that you would be happy to do so.

> Perhaps—I mean, Mr. Ginacoli still has a hour and fifteen minutes before he has to leave. Perhaps when you bring them in, you could remind them, 'is there —is there a certain area that you would like the Court to give some further instructions or clarification,' just to see if—if there is an area in which you can assist them in breaking whatever deadlock there is.
>
> And then if, come 11:30, this hasn't helped, then I can see that we're facing this problem. But maybe just reminding them that you can give them some clarification if there's something that's really sticking. That maybe, that might help them a little bit."
>
> (Tr. Feb. 24, 1993, pp. 5-6). (E.R.208-09)

The Court rejected Defense counsel's suggestion and dismissed Giancoli was from the jury even before he had to leave for his Board meeting. Moreover, Juror Giancoli was dismissed without even conducting a *voir dire*. In *Peek v. Kemp, supra,* the Court noted that where the Court is contemplating releasing a juror during deliberations, the Court must, *in order to satisfy Constitutional standards,* conduct a *voir dire* of the juror to make certain that the juror is not being removed solely because he cannot agree to a verdict.

> "Thus, the trial court's failure to inquire into a juror's purported incapacity before the juror is excused acquires Constitutional significance insofar as
>
> * * * *

[30] proceed with the remaining eleven jurors. The Court decided to remove Juror Pope and to permit the jury to go on deliberating without him. Approximately two hours after reconvening, the jury returned a verdict. *Tabacca,* at 913.

This Court held the trial court had abused its discretion in removing the juror. Noting that the trial itself had not been long, the juror had stated he would be

able to return the next day, and that "one additional day's delay is unlikely to induce dull memories on the part of the jurors even if they had taken a three day weekend." (*Id.* at 915) Moreover, this Court noted this was not a case of illness or physical incapacity but, rather, simply a case of lack of transportation which did not constitute "just cause" for the juror's removal. Finally, the Court noted that the jury had informed the Court that it was deadlocked on Friday, and it returned a guilty verdict within two hours of Pope's being excused. All of those issues combined convinced this Court that the Defendant had been denied his right to a unanimous verdict, and the matter was remanded for a new trial.

In the instant case, the same factors which influenced this Court's decision in *Tabacca* are present. The case here was not an especially long case; Giancoli would have been able to return the next day; he indicated on the juror's schedule that he had "no restrictions Thursday and Friday"; a delay of ½ day (or the afternoon) was "unlikely to induce dull memories on the part of the jurors"; the reason for his inability to continue deliberating on the afternoon of the 24th did not involve illness or any physical inability to deliberate (indeed, he had even less restriction upon his ability to deliberate than Juror Caroe); the [31] court was well aware that the jury was deadlocked having received at least three notes to that effect; and the jury returned a unanimous verdict less than an hour after Giancoli was removed from the jury.

Based upon the facts and the law, the Defendants were denied their right to a unanimous verdict by virtue of the court's having improperly removed Mr. Giancoli from the jury. As such, the Defendants are entitled to a new trial.

B. *The Jury's Verdict Against The Union And Jesse Durran, Jr. With Respect To The NEC Referral Cannot Stand Since It Is Not Supported By Either The Evidence Or The Law And Is Contrary To This Court's Decision In National Labor Relations Board v. Iron Workers Local Union 75, 583 F. 2d 1094 (9th Cir. 1978)*

Despite the Court's issuance of a Rule 50 Motion in favor of Appellants on Murray's duty of fair representation ("D.F.R.") claims, the Court improperly permitted the jury to consider whether the Union's failure to dispatch Murray to the N.E.C. job constituted a violation of his Landrum-Griffin rights under § 102.[6] Appellants respectfully submit that a hiring hall violation does not state a claim for relief under § 102 of

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[6] The Court's error in permitting this issue to go to the jury was exacerbated when the Court responded to the jury's inquiry as to why they were not deciding the D.R.R. claim. The jury asked if the "Plaintiff had withdrawn" the claim. The Court did not tell the jury that the Plaintiff did not prove his claim. Rather, the Court simply told the jury not to speculate why they were not deciding that issue. Thus, the jury could well have been left with the favorable opinion of Plaintiff that he had voluntarily withdrawn his claim, an opinion which would work to the detriment of Appellants. See, *e.g. Chapa v. Local 18, etc.*, 737 F.2d 929, 932 (11th Cir. 1984) (Where the Plaintiff's claim is unsupported by the evidence and the jury could have been prejudiced by evidence relating to other claims taken away from the jury by directed verdict, the District Court erred in not granting the Defendant Union a JNOV.)